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INVESTMENT INCENTIVES IN SINGAPORE - LEGAL ASPECTS

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance a thesis entitled INVESTMENT INCENTIVES IN SINGAPORE - LEGAL ASPECTS submitted by CHENG LIAN MAH in partial fulfilment of the requirements for the degree of Master of Laws.

ABSTRACT

Investors are unwilling to commit their capital unless they are assured of a sufficiently high return on their investments. In addition foreign investors, when considering investing outside their home country, are concerned not only with the profit-making factor, but also with the non-commercial risks attendant to foreign investments. A country attempting to attract foreign capital is judged not only by the investment inducements it offers but also by its investment climate as reflected in the attitude and actions of its government.

Singapore in its efforts to industrialize in order to solve its unemployment problem, found that it required a large amount of capital in order to build its industrial base. In order to attract capital, particularly foreign capital, Singapore offered investment incentives which were first embodied in statutory form in 1959 in the Pioneer Industries (Relief from Income Tax) Ordinance and the Industrial Expansion (Relief from Income Tax) Ordinance. The aforesaid Ordinances were subsequently repealed and replaced in 1967 by the Economic Expansion Investment Incentives (Relief from Income Tax) Act which consolidated the investment incentive law of Singapore.

The Singapore government has also attempted to create a conducive investment climate by setting up organizations for the purpose of assisting, advising and financing industrial projects. In addition the Singapore government assures by way of policy statements that notwithstanding exchange control restrictions, permission

will be readily granted for the remittance of the profits and capital of the foreign investors from sources within Singapore to their home country.

Under the Economic Expansion Investment Incentives (Relief from Income Tax) Act, the investment incentive offered is primarily in the form of a tax holiday. This enables the capital expenditure of an investment to be recovered at a faster rate than would otherwise be possible under the tax law of Singapore. Although there are certain requisites which must be satisfied prior to the application for the tax concessions under the aforesaid Act, the ultimate decision for the granting of such tax concessions is vested in the absolute discretion of the Minister of Finance.

The effect of tax concessions may, however, be nullified by the tax law of the foreign investor's country of residence and which may also give rise to the problem of double taxation. The foreign investor's tax liability when investing abroad is dependent on the combined effect of the tax laws of the country of his investment and the country of his residence. This in turn affects the return expectations of the foreign investor. One of the means of avoiding the above problem is the conclusion of the double taxation agreement between the foreign investor's country of investment and his country of residence. To date the Singapore government has entered into double taxation agreements with seven countries. The extent and effect of the double taxation agreement depends on the provisions therein.

The British investors are the only foreign investors who are enjoying the benefit of an investment guaranty scheme which had been agreed upon between the Singapore and the British governments. However, Singapore assures foreign investors that it is not the policy of the Singapore government to nationalize or restrict the remittance of profits and capital abroad notwithstanding the presence of exchange control restrictions. In the absence of any protection accorded to foreign investors in Singapore, any injury or loss suffered in consequence of the actions of the Singapore government can only be remedied in accordance with international law.

Notwithstanding the lack of guaranties by the Singapore government, foreign investors have been attracted to Singapore by the presence of the investment incentives and the conducive investment climate.

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CHAPTER I

INTRODUCTION

In 1959 with the election of a socialist party to power and the presence of militant trade union activities, Singapore was faced with the problem of potential investors moving away from Singapore. There was also present the unemployment problem posed by its growing workforce. The Singapore government realized that industrialization was the only means by which it could stimulate its economy and solve the unemployment problem. This resulted in the emphasis on industrialization which was the central feature of a national development plan. The national development plan also set out the structure for public contribution to economic development. Private enterprise was expected to play a leading role, particularly in industry, while the government was to look after the infrastructure.[1] The government realized that in addition to providing an adequate infrastructure, it had to play an essential and direct role in the encouragement of industrial growth and its assistance would be required in feasibility investigations, the promotion of industrial activities, helping to promote industrial finance, and, to a careful limited extent, in introducing tariffs to protect infant industries.

In order to build the necessary base large amounts of capital would be needed to be invested in equipment and machinery. This need for capital led to the enactment of two statutory legislations

1. For a general historical background leading to the industrialization of Singapore, see Hughes and You, editors, Foreign Investment and Industrialization in Singapore, (1969) pp.1-45.

granting tax relief as a form of investment incentive in an attempt to stimulate industrialization. The Pioneer Industries (Relief from Income Tax) Ordinance[2] gave manufacturers of products which qualified as pioneer products exemption from the prevailing 40 per cent company income tax for five years with the proviso that losses might be carried forward for credit beyond this period.[3] Accelerated depreciation allowance enabling firms which had been granted the status of pioneer enterprises to treat their assets as new for the purposes of depreciation at the end of the aforesaid five years were also granted under the Ordinance.[4] The Ordinance also provided that exemption from import duties on raw materials and equipment was to be given if deemed advisable. The Industrial Expansion (Relief from Income Tax) Ordinance[5] granted tax concessions to existing enterprises whose investment expansion was approved in accordance with the Ordinance. The tax exemptions were on a sliding scale adjusted to the amount of new capital invested. For the minimum amount of Singapore $10,000 the tax concession was eleven per cent per annum. The tax concession rose by one per cent for each subsequent Singapore $10,000 of capital expenditure, reaching a maximum of fifteen per cent for amounts of Singapore $50,000 of capital expenditure or over.[6] These two Ordinances were repealed and replaced in 1967 by the Economic Expansion Investment Incentives (Relief from

2. No.1 of 1959.
3. _Ibid._, ss.9 and 19.
4. _Ibid._, s.14.
5. No.2 of 1959.
6. _Ibid._, s.10.

Income Tax) Act.[7]

Since 1959, the Singapore government has emphasized on industrialization and the need to attract foreign capital into Singapore. The Singapore government recognizes the fact that the financial incentives offered must be as attractive as, if not more than, those offered by other countries in order to attract the required foreign capital.[8] It is also recognized that the effect of the fiscal incentives must not be nullified by the unnecessary rigidity, officiousness and red tape on the part of the bureaucracy but that the government must ensure that those who respond and invest in Singapore must receive full co-operation and support at all sectors of the government complex.[9]

Whether the investment incentives offered are successful in attracting foreign capital into Singapore depends on how effective such investment incentives are in meeting factors which influence the decision process of the foreign investor to invest abroad.

Like any businessman, the foreign investor is concerned with the potential margin of profit he is likely to make. Investing abroad requires extra effort. The foreign investor is usually not familiar with the business conditions and other related factors such as governmental policies and labour and social enviroment

7. No.36 of 1967.
8. Stockwin, Sufficient Incentive?, Far Eastern Economic Review, November 22, 1966, p.589.
9. Ibid., p.592.

in the foreign country. Unless the potential margin of profit is appreciably greater than that of an investment in his home country, the foreign investor is not likely to be inclined to invest abroad.

The foreign investor is also concerned with the non-commercial risks attendent to foreign investments.[10] The most common forms of non-commercial risks are expropriation without adequate compensation, imposition of exchange control restrictions that prevent the remittance of profits abroad, and import restrictions that prevent the importation of necessary equipment or raw materials. These are, however, easily identifiable non-commercial risks. "Creeping expropriation" is another form of non-commercial risk which is feared by the foreign investor. It represents the great variety of subtle measures which can be used by the government of the host country to interfere with the business operations of the foreign investor. This may take the form of unreasonable delay, or refusal of personnel or import permits for essential technical know-how, materials and equipment; the imposition of tax that discriminate in substance if not in form against foreign-owned business; and restrictions of profits by governmentally subsidized competition. In such cases it is difficult to identify and define the violation of the foriegn investor's rights and to evaluate the amount of loss that can be said to have resulted. The foreign investor

10. See for instance, The Protection of Private Property Invested Abroad, a report by the Committee on International Trade and Investment Section of International and Comparative Law, American Bar Association, January, 1963, p.2.

therefore requires protection against such non-commercial risks. The presence or absence of such protection is an influencing factor in the foreign investor's choice of countries outside his home country in which to invest.

It is therefore proposed to examine the investment incentives offered by Singapore and their legal aspects in the light of the above.

CHAPTER II

TAX INCENTIVES

Tax concessions represent perhaps the most widely adopted measure, especially by developing countries, to promote economic development and to attract foreign capital.[12] Virtually all developing countries, and many developed countries too, offer inducements to approved enterprises in the form of reductions and exemptions from import duties and income tax for a given period of time. In some countries relief from tax on sales is also provided for as part of the inducement.

The principal purpose of tax reliefs is to enhance the profitability of a newly established business or expansion of an existing business which will contribute to the country's economic objectives. The capital expenditure of a firm is reduced by relief from custom duties on imports of equipment and construction materials. Relief from duties on imports of raw and semi-processed materials and other components generally provides a reduction in production cost and an advantage in establishing a domestic or foreign market. Relief from income tax increases the profit prospects and enables an enterprise to recover its capital costs more quickly. These benefits are, however, temporary and a long-term business must therefore expect to operate under a country's permanent tax law.

12. See United Nations, Economic and Social Council, "Measures for the Promotion of Foreign Private Investment", Ch.VII in "The Promotion of the International Flow of Private Capital: Fourth Report of the Secretary General", Official Records of the Economic and Social Council, (37th. Session, Geneva, 1964), Document E/3905, paras.289-333 (pp.56-71).

Tax benefits are usually limited to certain priority industries which a country is seeking to stimulate in accordance with its national development plan. In Singapore the tax incentives are directed towards achievement of its industrialization programme which is considered of vital importance to its economy. The incentives are primarily in the form of relief from income tax for certain selected categories of industries. The first of these tax incentives were embodied in early 1959 in the Pioneer Industries (Relief from Income Tax) Ordinance[13] and the Industrial Expansion (Relief from Income Tax) Ordinance.[14] Both these Ordinances were repealed and replaced in 1967 by the Economic Expansion Incentives (Relief from Income Tax) Act[15] (hereinafter referred to as "the Act") which amended and consolidated the law relating to incentives for the establishment of pioneer industries and economic expansion generally. The Act has since been amended in respect of certain provisions in 1970 by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act.[16]

GENERAL

Under the repealed Pioneer Industries (Relief from Income Tax) Ordinance and the Industrial Expansion (Relief from Income Tax) Ordinance (hereinafter referred to as "the Pioneer Industries Ordinance" and "the Industrial Expansion Ordinance" respectively) the

13. No.1 of 1959.
14. No.2 of 1959.
15. No.36 of 1967.
16. No.31 of 1970.

enterprises subject to the provisions of the above two Ordinances eligible to qualify for tax reliefs were:-[17]

1. any company incorporated or registered under any law in force in Singapore;
2. an individual carrying on trade or business as sole proprietor; and
3. an association or body of persons carrying on trade or business in partnership.

Under the Act the benefits of its provisions are available only to any company incorporated or registered in accordance with any laws relating to companies in Singapore.[18] A sole proprietorship or partnership is therefore not entitled to the tax reliefs granted under the Act.

The Act does not make any distinction between companies incorporated in Singapore and foreign companies. Any company incorporated or registered in Singapore which satisfy the pre-requisites specified in the Act may apply for the tax reliefs provided therein. A company in order to be incorporated in Singapore must have at least one director and one secretary (a natural person) who are ordinarily resident in Singapore.[19] In the case of a foreign company it must be registered in accordance with the provisions of the

17. Pioneer Industries Ordinance, _supra_ note 13, s.3 definition of "enterprise" which includes also a company incorporated outside Singapore but such company in order to carry on business in Singapore must be registered in accordance with the Companies Act. Industrial Expansion Ordinance, _supra_ note 14, s.3 definition of "enterprise".
18. _Supra_ note 15, s.3 definition of "company".
19. Companies Act, No.42 of 1967, ss.122(1) and 139.

Companies Act before it can carry on business activities in Singapore. On registration of a foreign company, the names of at least two persons, not including another foreign company who are resident in Singapore and authorized to accept on the foreign company's behalf service of process and any notice required to be served on the foreign company must be submitted to the Registrar of Companies.[20]

Under the prevailing income tax law of Singapore, the rate of tax payable by both companies incorporated in Singapore and foreign companies is the flat rate of forty per centum on every Singapore dollar of the chargeable income.[21] Persons who are non-residents in Singapore are also subjected to the same flat rate of forty per centum on every Singapore dollar of the chargeable income.[22] In the case of persons resident in Singapore, the rate is a graduating scale from six per centum to a maximum of fifty per centum on every Singapore dollar of the chargeable income.[23]

The extent of the tax reliefs available under the Act depends on whether a company on application is certified to be one or more

20. The Companies Act, supra note 19, s.332(1)(e).
21. Income Tax Ordinance, Chapter 166 (Reprint: May 25, 1966) s.43.
22. Ibid.
23. Income Tax Ordinance, supra note 21, s.42. The graduated rate of tax payable is as follows:-

Chargeable Income	Rate
For the first S$2,500	6%
For the next S$2,500	9%
For the next S$2,500	12%
For the next S$2,500	15%
For the next S$5,000	20%
For the next S$5,000	23%
For the next S$10,000	30%
For the next S$15,000	40%
Exceeding S$50,000	50%

of the following:-

1. a pioneer enterprise and its product a pioneer product;
2. an expanding enterprise and its product an approved product; and or
3. an export enterprise and its product or produce an export product or produce.

The Act does not grant the tax reliefs to any company which meets the pre-requisites therein as of right. Singapore has adopted the discretionary approach in determining whether a company should, on application, be granted the benefits of the tax reliefs under the Act. Companies which satisfy the pre-requisites may apply to be certified as any one or more of the aforesaid categories of enterprises. In considering the application the following factors are taken into consideration - whether the applicant company's trade or business will contribute to the promotion and enhancement of the economic and technological development of Singapore and whether the issue of the certificate applied for is expedient in the public interest.[24] The decision to issue the certificate applied for is in the absolute discretion of the Minister of Finance.[25]

The discretionary approach depends on the quality of the administration. There is a possibility of certificates being issued indiscriminately and may, at times be influenced by political pressures and bribery or delays in decision making resulting in worthwhile projects being delayed or deterred. The discretionary approach,

24. The Act, supra note 15, ss.4, 16 and 20.
25. Ibid.

however, allows flexibility and through proper administration ensures that tax reliefs are limited to industries which are in accordance with the country's objectives and economic needs which are the subject of constant changes. However, under the discretionary approach, a company which meets all the pre-requisites laid down in the Act is not assured of the tax benefits provided therein but is subject to administrative uncertainties.

On the other extreme the non-discretionary approach grants the tax benefits to all who meet the general criteria as laid down in the investment incentive law and furnishes a more open and objective procedure that is free of administrative uncertainties. The non-discretionary approach may, however result in the lowering of the standard levels of the tax benefits granted in order to prevent heavy tax revenue losses. This may, in turn, result in the benefits granted failing in their objective to attract industries which are more essential to the country's economic needs.

It is important in an investment incentive programme to be able to anticipate changes in the economy and requirements of a country. The non-discretionary approach may therefore be too rigid. In the discretionary approach, the scope of administrative discretion may, however, be narrowed without removing it entirely by setting down standards in terms of employment; size of investment; amount of value added in respect of an existing business; classification of products; classification of industries into new or established industries; and other factors relevant in determining the potential economic benefits of an investment. The above may be stipulated in the investment incentive law as part of the facts certain to be

taken into consideration in the decision process of the administrative discretion.[26]

PIONEER ENTERPRISES

Pioneer industry policy is the result of a country's desire to encourage new and necessary industries usually for the purpose of reducing the country's dependence on import. In the case of Singapore it is also for the purpose of exporting the manufactured goods and creating employment for its growing workforce. The pioneer status granted to a company gives it a preferred position in getting established usually through the exemption from import duties and income tax and through other concessions.

Generally a pioneer enterprise is regarded as one that is not already carried on in the country, or an industry that is not producing enough to meet the current or expected domestic market. Such industry may be identified in an official list or is determined administratively on application. Consistent with the discretionary approach adopted by Singapore, the Act does not specify the types of industry which will qualify as a pioneer enterprise. The matter is left to be determined by administrative discretion on application.

Any company which has incurred or is intending to incur a fixed capital expenditure of not less than one million dollars[27] and which is desirous of producing a pioneer product may apply to

26. See Lent, Tax Incentives for Investment in Developing Countries, Vol.XIV No.2, International Monetary Fund Staff Papers 249, pp.282-287 (July 1967).
27. All references to dollars mean Singapore dollars. S$3 is approximately equivalent to US$1.

be certified as a pioneer enterprise. Fixed capital expenditure is defined in the Act to mean capital expenditure by the applicant company on its factory building in Singapore and on any new plant or new machinery used in Singapore, and, subject to approval on any second-hand plant or second-hand machinery but excluding expenditure on the acquisition of land in connection with its intended pioneer product.[28]

A company which has been certified as a pioneer enterprise is granted total exemption from tax for a period of five years as from the day of production specified in its pioneer enterprise certificate in respect of all profits derived from its certified trade or business.[29] Further any dividend paid by the pioneer enterprise during the tax relief period is also exempted from tax in the hands of the shareholder whether such shareholder is a resident or a non-resident of Singapore.[30] Where the shareholder is a holding company and a dividend is paid to its shareholder out of the tax exempted dividend paid by the pioneer enterprise to the holding company, such

28. The Act, supra note 15, s.5 as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970. Prior to the amendment there is no requirement as to the amount of fixed capital expenditure incurred or to be incurred by a company before it is entitled to make an application. Under the repealed Pioneer Industries Ordinance, supra note 12, s.2(d), the applicant company must set out in the application the particulars of the capital expenditure incurred or to be incurred but there was no stipulation as to the required minimum sum of capital expenditure.
29. The Act, supra note 15, s.6.
30. The Act, supra note 15, s. 14(3).

dividend is also exempted from tax in the hands of the shareholder of the holding company.[31] The dividend paid by a pioneer enterprise on a share of a preferential nature does not, however, enjoy tax exemption and is therefore liable to tax in the hands of the shareholder.[32]

Besides the above total exemption from tax in respect of the profits from its certified trade or business, the pioneer enterprise is granted the further concession of being allowed to carry forward to subsequent years of assessment, even after the expiration of the tax relief period, the deductible allowances provided for under the current tax law where in any year of assessment during the tax relief period full effect cannot be given to such deductible allowances by reason of the insufficiency of profits for that year of assessment.[33] This enables the pioneer enterprise to a tax-free recovery of its capital investment.

During the tax relief period the pioneer enterprise is prohibited from carrying on any other trade or business besides the trade or business specified in its pioneer enterprise certificate

31. The Act, supra note 15, s.14(9).
32. The Act, supra note 15, s.14(3).
33. The Act, supra note 15, s.10(1) as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970. Under the Income Tax Ordinance, Chapter 166, (Reprint: May 25, 1966) the deductible allowances permitted are initial and annual allowances on industrial buildings and structures of a sum equal to one-tenth of the expenditure (s.16); balancing allowances and charges on industrial buildings and structures (s.17); initial and annual allowances on machinery and plant of a sum equal to one-fifth of the expenditure (s.19); balancing allowances and charges on machinery and plant (s.20); and allowances for the replacement of machinery or plant (s.21). The above are equivalent to capital cost allowances.

unless written permission has been duly given.[34] Where such other trade or business is permitted, separate accounts for income tax purposes must be kept as the income of the permitted trade or business is not entitled to relief from income tax. However, any loss resulting from such permitted trade or business is allowed to be included in the computation of the income of the pioneer enterprise.[35] This concession is of limited benefit as the income of the pioneer enterprise is exempted from tax during the tax relief period. The benefit arises only if as a result of the inclusion of the aforesaid loss the income of the pioneer enterprise is thereby made insufficient to give effect to the deductible allowances provided for in the current tax law and such deductible allowances may therefore be carried forward to be deducted in subsequent years of assessment even after the expiry of the tax relief period. Where the carrying on of the permitted trade or business results in a profit, such profit is subject to tax. If the profit of the permitted trade or business amounts to less than five per cent of the total income of the pioneer enterprise, the statutory income of such permitted trade or business is deemed to be five per cent of the said total income of the pioneer enterprise and is subject to tax accordingly.[36] The taxing authorities may, however, regard such income or loss from the permitted trade or business as part of the income or loss of the

34. The Act, *supra* note 15, s.8(1).
35. The Act, *supra* note 15, s.8(4).
35. The Act, *supra* note 15, s.8(5).

pioneer enterprise if in their opinion the permitted trade or business is subordinate and incidental to the carrying on of the trade or business specified in its pioneer enterprise certificate.[37]

A pioneer enterprise which has incurred or is intending to incur fixed capital expenditure for the expansion of its certified trade or business of a sum not less than one thousand million dollars, or, of a sum not less than one hundred and fifty million dollars but less than one thousand million dollars and more than fifty per cent of the paid-up capital of the pioneer enterprise are held by persons permanently resident in Singapore, may apply for further tax relief which is in the form of deferral depreciation allowances. The influencing factor in determining whether the further tax relief will be granted is that the applicant pioneer enterprise must, in the opinion of the Minister of Finance, be incurring the aforesaid expenditure towards the enhancement or promotion of the economic or technological development of Singapore. The granting of the further tax relief enables any asset acquired through the aforesaid expenditure to be deemed to have been incurred immediately following the last day of the pioneer enterprise's tax relief period for the purposes of the deductible allowances under the current tax law. This means in effect that the deductible allowances can therefore be used to off-set the profits in subsequent years of

37. The Act, supra note 15, s.8(6).

assessment after the tax relief period.[38]

Tax reliefs in favour of pioneer enterprise are based on the presumption that investors who open up new industries contribute more to the country's economic development and face greater risks than those who enter a field pioneered by others. This may not be true where the first domestic producer enters a market already developed by importers. It is also feared that a pioneer enterprise approach may lead to domestic monopoly. Under the Act the granting of the pioneer enterprise status is subject to administrative discretion. It is therefore open to the administration to exercise its discretion in such a manner so as not to create a domestic monopoly and at the same time also not to jeopardize the first pioneer enterprise in its field.

EXPANDING ENTERPRISE

Tax incentives are also provided by the Act for existing enterprises. Under the Act, a company which is intending to incur capital expenditure exceeding ten million dollars in the purchase of new or second-hand productive equipment for the purpose of the manufacture or increased manufacture of a product which has been

38. The Act, supra note 15, s.10(2). Under the tax law of Singapore deductible allowances are not deferrable.

declared an approved product may apply to be certified as an expanding enterprise.[39] In respect of the purchase of a second-hand productive equipment, it must be proved to the satisfaction of the Minister of Finance that the purchase price represents a fair open market value and is economically justifiable.

A company on being certified as an expanding enterprise is entitled to be granted, at the discretion of the Minister of Finance, a tax relief period not exceeding five years as from the first

39. The Act, supra note 15, s.17 as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970. Prior to the amendment in 1970, a company which was intending to incur new capital expenditure exceeding Singapore dollars one million or, where such expenditure is less than Singapore dollars one hundred thousand and will result in an increase of not less than thirty per cent in value at original cost of all the productive equipment of the company may apply to be certified as an expanding enterprise.

Under the repealed Industrial Expansion Ordinance, supra note 14, s.5, a company applying to be certified as an expanding enterprise referred to therein as an "approved enterprise" must show that it:-

(a) will incur new capital expenditure of not less than Singapore dollars ten thousand for the manufacture or increased manufacture of the approved product;
(b) is adequately financed;
(c) has adequate trained personnel in its employment or is able to obtain the services of such personnel;
(d) has access to the necessary technical information;
(e) is able to obtain raw materials;
(f) possesses or will possess the necessary factory; and
(g) will be able substantially to increase its production capacity.

There has therefore been a substantial increase in the amount of new capital expenditure before an existing enterprise is able to apply to be certified as an expanding enterprise since the Singapore government first offered investment incentives in 1959.

day of its accounting period commencing on or after the expansion day specified in the expansion enterprise certificate. The expansion day is the date on or before which the productive equipment is put into operation or, at the expanding enterprise's option, on the first day of the accounting period on which the expansion day falls.[40]

Where the expanding enterprise is granted a tax relief period of less than five years, the tax relief period may be extended to five years at the discretion of the Minister of Finance if he is satisfied that the expanding enterprise has incurred by the end of the said three years tax relief period new capital expenditure of not less than Singapore dollars two hundred and fifty thousand.[41]

During the tax relief period, only the income from the trade or business specified in the expanding enterprise certificate referred to as the expansion income is affected by the tax relief. Where, therefore, the expanding enterprise is concurrently carrying on any trade or business other than the certified trade or business, the Comptroller of Income Tax is vested with the right to determine the manner in which the expansion income shall be arrived at as would in the circumstances be reasonable.[42] Where in the opinion of the Comptroller of Income Tax the carrying on of such other trade or business is subordinate or incidental to the carrying on of the certified trade or business, the income or loss relating

40. The Act, supra note 15, s.18(1).
41. The Act, supra note 15, s.18(2).
42. The Act, supra note 15, s.19(3).

thereto may be deemed to form part of the expansion income of the expanding enterprise.[43]

The tax relief granted to the expanding enterprise in respect of its expansion income is only to the following extent:-[44]

1. Where the income of the expanding enterprise for the accounting period immediately preceding the tax relief period equals or exceeds the expansion income, no tax relief is granted.

2. Where the expansion income exceeds the income of the expanding enterprise in the accounting period immediately preceding the tax relief period, the amount of excess does not form part of the statutory income of the expanding enterprise for any year of assessment during the tax relief period. However, the maximum amount permitted to be exempted from tax during the tax relief period is an amount not

43. The Act, supra note 15, s.19(4).
44. The Act, supra note 15, s.19(5) as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970. Under the repealed Industrial Expansion Ordinance, supra note 13, s.10, the tax relief granted was in the form of annual allowances in addition to the allowances granted under the current tax law on the new capital expenditure for a period of five years from the date of production in respect of the aggregate new capital expenditure incurred by the expanding enterprise (referred to in the Ordinance as an "approved enterprise") during the period of three years from the date of coming into operation of the Ordinance according to the following rate annually for five years from the date of production:-

Value of the aggregate new capital expenditure	Rate
S$10,000 or above but less than S$20,000	11%
S$20,000 or above but less than S$30,000	12%
S$30,000 or above but less than S$40,000	13%
S$40,000 or above but less than S$50,000	14%
S$50,000 or above	15%

exceeding the sum which bears the same proportion to the expansion income as the new capital expenditure on the productive equipment bears to the total of such new capital expenditure on the productive equipment and the value at original cost of the productive equipment owned or used by the expanding enterprise prior to being certified as an expanding enterprise unless the Minister of Finance in his discretion otherwise decides.

In order to earn the tax relief the expanding enterprise must therefore increase the volume of its production and sale of the approved product specified in its expanding enterprise certificate. Where the expanding enterprise is also holding the pioneer enterprise certificate or both the pioneer enterprise certificate and the export enterprise certificate, the total amount permitted to be exempted from tax is an amount not exceeding one hundred per cent of the expansion income.

The Act further provides that any dividend paid by the expanding enterprise from that portion of the expansion income exempted from tax is in the hands of the shareholder of the expanding enterprise also exempted from tax whether such shareholder is a resident or non-resident of Singapore.[45] Where the shareholder is a holding company and dividend is paid to its shareholder from the tax exempted dividend paid by the expanding enterprise to the holding company

45. The Act, supra note 15, s.19A(3) as added in by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970.

such dividend in the hands of the shareholder of the holding company is also exempted from tax.[46] However, any dividend paid by the expanding enterprise from that portion of its tax exempted expansion income in respect of any share of a preferential nature is not exempted from tax in the hands of the shareholder and is liable to tax accordingly.[47]

EXPORT ENTERPRISE

A further provision relating to existing enterprises is the tax relief accorded to such existing enterprises which qualify to be certified as export enterprises. In order to qualify to be certified as an export enterprise, a company must be manufacturing or propose to manufacture any product which has been declared an export product or the company must be engaged in deep-sea fishery where the produce of such deep-sea fishery has been declared an export produce either wholly or partly for export.[48]

The export enterprise certificate is granted subject to the sales by the export enterprise of its export product or export produce to be not less than twenty per cent of the total sales of the export enterprise and must amount in value to not less than one hundred thousand dollars in any accounting year of the export enterprise during the tax relief period granted.[49]

46. *Supra* note 45.
47. The Act, *supra* note 15, s.19A(9) as added in by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No. 31 of 1970.
48. The Act, *supra* note 15, s.20.
49. The Act, *supra* note 15, s.21.

The tax relief granted is for a period of five years commencing from the export year of the export enterprise.[50] Where the export enterprise is also holding a pioneer enterprise certificate and its export year falls within the tax relief period granted under its pioneer enterprise certificate, the export enterprise tax relief period commences from the year immediately after the determination of the tax relief period granted under its pioneer enterprise certificate and continues for such period which together with its tax relief period granted under the pioneer enterprise certificate total in the aggregate to eight years.[51] Thus if under its pioneer enterprise certificate, a company is granted a tax relief period in respect of its export enterprise status commencing after the determination of the five years tax relief period under its pioneer enterprise status. A company, when certified both as a pioneer enterprise and an export enterprise can therefore obtain only a maximum aggregate tax relief period of eight years.

The export enterprise is further entitled to a tax relief period of fifteen years if it has incurred or is intending to incur fixed capital expenditure of not less than one thousand million dollars in the purchase of any plant or machinery in connection with its export product or export produce. Where the fixed capital

50. The Act, supra note 15, s.23(1)(a) as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970.
51. Ibid., s.23(1).

expenditure is less than one thousand million dollars but more than one hundred and fifty million, the export enterprise is qualified for the aforesaid fifteen years tax relief period provided more than fifty per cent of its paid-up capital are in the hands of persons permanently resident in Singapore. The plant or machinery purchased need not necessarily be new but may, subject to the approval of the Minister of Finance, be a second-hand plant or second-hand machinery. The fixed capital expenditure must, however, in the opinion of the Minister of Finance, promote or enhance the economic or technological development of Singapore.[52] Where the export enterprise is also certified as a pioneer enterprise, the tax relief period to be granted is that period which together with the tax relief period granted under its pioneer enterprise certificate total in the aggregate to fifteen years.[53] The Minister of Finance may, at his discretion, extend the tax relief period of an export enterprise as and when he is satified that it is expedient in the public interest to do so.[54]

The tax relief granted is applicable only when in any year of assessment within the tax relief period the export sales by the export enterprise of its export product or export produce amounts, in proportion, to not less than twenty per cent of the total sales of the export enterprise, and in value, to not less than Singapore dollars one hundred thousand.[55] Where the above minimum requirements as to proportion and value have not been satisfied, the export enterprise may make representations to the Minister of Finance, and

52. Ibid., s.23(2).
53. Ibid.
54. Ibid., s.23(3).
55. The Act, supra note 15, s.29.

if the failure to realize the aforesaid minimum requirements was due to causes beyond the control of the export enterprise, the Minister of Finance may, having regard to the quantum of the export enterprise output and sales other than the export sales and if in his opinion it is reasonable and expedient in the public interest, exercise his discretionary right and direct that the tax relief granted to apply notwithstanding the failure of the export enterprise to meet the aforesaid requirements.[56]

The tax relief is applicable only to ninety per cent of the export profit of the export enterprise in any year of assessment within the tax relief period.[57] For the purposes of tax relief, the export profit of the export enterprise, including the export enterprise which is also certified as a pioneer enterprise, is computed to be the excess of such profit over a fixed sum to be determined as follows:-[58]

1. In the case of an export enterprise which has previously exported the export product or export produce specified in the export enterprise certificate for three years immediately preceding the issue of the export enterprise certificate, the fixed sum is the amount equal to one-third of the profit of the export sales over the aforesaid period of three years which is that part of the income so ascertained which bears

56. Ibid.
57. The Act, supra note 15, s.30(3).
58. The Act, supra note 15, s.28(3) as amended by the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act, No.31 of 1970.

the same proportion to the total income of the export enterprise as the total value of the export sales of the export product or export produce whether made directly or indirectly by sale to an independent exporter bears to the total value of the sums received over the aforesaid period of three years in respect of the following:-

(a) its domestic sales of manufactured products or produce at ex-factory prices;

(b) its export sales of its export product or export produce;

(c) its export sales of other products; and

(d) all other sales and provision for service.

2. In the case of the export enterprise which has not prior to its date of application for the export enterprise certificate exported the export product or the export produce specified in its export enterprise certificate for three years immediately preceding its application, the fixed sum is the amount that the Minister of Finance may, in his discretion, determine having regard to the total sales of such export enterprise and to the percentage of the total sales of the other major export enterprises exporting like export product or export produce.

Any dividend paid by the export enterprise from such tax exempted export profit is in the hands of the shareholder of the export enterprise also exempted from tax whether such shareholder is a resident or non-resident of Singapore. Where the shareholder of the

export enterprise is a holding company and dividend is paid to its shareholder from the tax exempted dividend paid by the export enterprise to the holding company, such dividend in the hands of the shareholder of the holding company is also exempted from tax. However, any dividend paid by the export enterprise out of its tax exempted export profit on any preferential share is not exempted from tax in the hands of the shareholder of the export enterprise and is therefore liable to tax accordingly.[59]

INTEREST ON APPROVED FOREIGN LOAN

Besides the tax relief granted to companies engaged in industrial activities relating to approved products, the Act also provides for tax relief in respect of interest payable to a person who is a non-resident of Singapore on loans which he has given to a company in Singapore provided such loans have been duly certified as approved foreign loans and the provisions of the Act are complied with. The approved foreign loan certificate is granted on application by the borrowing company and is subject to administrative discretion. There are certain pre-requisites to be complied with before the borrowing company is entitled to submit an application for the loan to be certified as an approved foreign loan.

Under the Act the loan may be made to any company carrying on any industry in Singapore but it must be for a sum of not less than Singapore dollars two hundred thousand.[60] The Minister of Finance

59. The Act, supra note 15, s.31(3).
60. The Act, supra note 15, s.36.

may, at his discretion waive the above requirement and consider an application in respect of a loan of a sum less than the required minimum amount if he deems it expedient to do so.[61] The loan must be for the purchase of productive equipment for the purposes of the trade or business of the borrowing company and may be in the form of a financial agreement whereby credit facilities are granted for the said purchase. The person giving the loan must not be a resident of Singapore. The term "person" is not defined in the Act but should be interpreted to include not only individuals but also companies and organizations. It is difficult to envisage loans of the required minimum amount being advanced only by foreign individuals. It would be reasonable to envisage that such loans will normally be made available by the foreign company selling the productive equipment or through organizations whose business is international financing. To restrict the term "person" to only individuals is to defeat the purpose of the provision.

The approved foreign loan certificate is issued only when the Minister of Finance is satisfied with the *bona fides* of the application and that it is in the public interest to issue such certificate.[62] The certificate is issued subject to the condition that the productive equipment purchased by means of the approved foreign loan must not be sold, transferred or otherwise disposed of except with the prior written permission of the Minister of Finance and subject further to whatever conditions the Minister of Finance deems

61. *Supra* note 60.
62. *Supra* note 60.

fit.[63] The issue of the approved foreign loan certificate is therefore a matter of administrative discretion.

The approved foreign loan certificate does not automatically result in the interest payable on the foreign loan being exempted from tax. The tax relief takes effect only if it is proved that such exemption does not result in the increase of the tax liability of the foreign lender in his country of residence.[64] Any additional interest payable on the approved foreign loan as a result of the extension of the period of time within which it is repayable is also exempted from tax provided that the rate of interest during such extended period is not higher than the original rate of interest specified in the approved foreign loan certificate unless such increase in the rate of interest has the written approval of the Minister of Finance.[65]

ROYALTIES, FEES and DEVELOPMENT CONTRIBUTIONS

In order to encourage and facilitate local enterprises in Singapore to use and acquire patents, designs, formulae and like matters, the Act provides that the royalties or technological assistant fees or contributions to research and development costs payable to a person not resident in Singapore in accordance with any agreement relating thereto by any company engaged in any industry in Singapore may, on application by the company making the

63. The Act, supra note 15, s.36.
64. The Act, supra note 15, s.38.
65. Ibid.

payment, be certified as approved royalties, fees or contributions as the case may be. The factors influencing the granting of such certificate are that the Minister of Finance must be satisfied as to the bona fides of the application and that it is expedient in the public interest to grant such certificate.[66] The certificate granted is subject to the condition that no variation is allowed to the agreement or arrangement relating to such approved royalties, fees or contributions without the prior sanction in writing of the Minister of Finance except in cases where for the same consideration the amount of the approved royalties, fees or contributions payable is reduced.[67] The certificate may further be subjected to any other conditions the Minister of Finance may deem fit.

The tax relief granted in respect of approved royalties, fees or contributions is only partial exemption from tax. For each year of assessment the recipient of the approved royalties, fees or contributions is subject to tax at the concessionary rate of twenty per cent on every chargeable Singapore dollar of such income received.[68] However, where the Minister of Finance deems it expedient in the public interest to do so, he may by endorsement on the approved royalties, fees or contributions certificate grant total exemption from tax in respect of the same.[69] The Act further provides that where such approved royalties, fees or contributions, either wholly or in part, have been expended in the acquisition of

66. The Act, supra note 15, s.40.
67. The Act, supra note 15, s.40(1).
68. The Act, supra note 15, s. 43.
69. Ibid.

ordinary share capital in the company making such payments, the amount of income equal to such expenditure is granted total exemption from tax.[70] The aforesaid tax exemption are only applicable when it is proved that they do not result in an increased tax liability on the recipient in his country of residence.[71]

SUMMARY

The tax incentives offered by Singapore, although in the form of statutory legislation are subject to such wide administrative discretion that even if an investment meets the pre-requisites laid down in the Act, the foreign investor is still not assured with certainty of qualifying for and enjoying the benefits of the tax relief.

The tax relief granted by Singapore is only in the form of a tax holiday. Some countries have provided for tax concessions in the form of investment allowances or grants which provide for a write-off of depreciable property in addition to the depreciation allowances provided for under their tax laws.[72] This have the effect of permitting deductions in excess of the costs of the depreciable assets as such investment grants or allowances are over and above the depreciable allowances under the tax law. In Singapore a

70. The Act, supra note 15, s.44.
71. The Act, supra note 15, s.42.
72. Investment allowances and grants may range from 25% to 45% of the capital costs. For the extent to which some countries give such investment grants and allowances see Lent, Tax Incentives for Investment in Developing Countries, International Monetary Fund Staff Papers, Vol.XIV No.2 (July 1967) 249, pp.267-268.

a concession is made only in respect of depreciable allowances related to assets acquired by the fixed capital expenditure of the expanding or export enterprise which qualify for further tax relief. In such a case, the depreciable allowances are allowed to be deductible after the expiration of the tax relief period granted in respect of its expanding or export enterprise status in stead of being deductible as from the date of acquisition of the assets as required under the tax law of Singapore. The deferred depreciable allowances do not have the effect of permitting deductions over and above the costs of the depreciable assets.

To a new enterprise a tax holiday is of benefit only if the enterprise expects to make a profit during the first few years of its operation. However, some enterprises are started in the expectation that profits will not be realized during the first few years of operation. In such a case the tax relief period of a maximum term of five years is of not much benefit. An investment allowance or grant based on a percentage of the capital costs with the right to carry forward the unused amount for credit in subsequent years will be more beneficial to such enterprises. Investment allowances or grants without the right to carry forward the unused amount is of no benefit as the new enterprises may not make sufficient profits to take advantage of the allowances or grants.

For an existing enterprise, investment allowances or grants can also be more attractive. An existing enterprise which is well established and a profitable concern is likely to have enough income to take immediate advantage of the investment allowances or grants in respect of its investment made for replacement or expansion.

The qualifying pre-requisite for the tax concessions under the Act in Singapore is the amount of the capital of the enterprise. Since capital is scarcer than labour, the investment law of Singapore should not be directed only to offering tax inducements for the use of capital intensive enterprises. It may be worth considering the possibility of offering subsidies based on the number of workers employed rather than solely on the size of the investment. This will be in line with the government's concern to stimulate industrialization in order to solve its unemployment problem.

In some countries, tax exemption is limited only to the profits of the enterprise and not to dividends except in the case of dividends which are re-invested in or put into a separate reserve of such enterprise. Singapore extends the tax exemption to dividends. The benefit of such tax exemption may be nullified when the dividends are distributed abroad to a foreign shareholder as his country of residence may tax all or part of the dividends that are remitted. If the tax burden is high in the foreign shareholder's country of residence, tax exemption on dividends may even be responsible for the increased tax liability of the foreign shareholder in his country of residence. It may also mean that the unilateral tax relief granted by Singapore is being collected by the foreign shareholder's country of residence. This possibility has induced the Singapore government to limit the granting of tax relief in respect of approved foreign loan and approved royalties, fees and contributions to be apllicable only when it is proved that the tax relief will not result in the increase of the tax liability of the recipient in his country of

residence. This ensures that the recipient enjoys the benefit of the tax relief as intended.

The tax holiday granted by Singapore is limited to a maximum period of five years. This has been said to be a conservative period as some countries offer tax holidays up to ten years or more.[72a] In some countries a graduated tax relief period is granted depending on the size of the enterprise.[72b] Singapore may perhaps consider the possibility of providing a graduated tax relief period instead of leaving the matter in the absolute discretion of the Minister of Finance. The provision that the size of the enterprise will affect the length of the period of tax relief to be granted will be a useful information to the foreign investor.

The extent of the tax concessions in the investment incentive law is dependent on the needs of the country. Tax concessions are peculiar to the country and are usually based on economic exigencies. They are therefore subject to change according to the needs and

72a. For example the tax relief period offered by Ghana, 4-10 years; Liberia, 5-10 years; Senegal, 8 years; Chad and Congo(Brazzaville),10-15 years; Niger and Uruguay, 10 years; Togo, 5-25 years. But the tax relief period offered by Malaysia and Nigeria, 2-5 years; Pakistan, 2-6 years; Republic of China, Ivory Coast and Sierra Leone, 5 years; Trinidad, 5 years renewable for 5 years. Lent, Tax Incentives for Investment in Developing Countries, International Monetary Fund Staff Papers, Vol.XIV No.2 (July 1967) 249, 268-269. It is interesting to note that certain selected Japanese firms surveyed did not object to the suggestion that the tax relief period offered by Singapore should be extended to 10 years, but there was no strong support for this suggestion either, Hughes and You, editors, Foreign Investment and Industrialization in Singapore, (1969), p.93.

72b. For example Malaysia, Nigeria and Togo. Lent, supra note 72a.

requirements of the country. Their effect is only for a limited period and is affected also by the tax law of the foreign investor's country of residence. In the long run it is the combined effect of the tax laws of the capital importing country and the foreign investor's country of residence which determine whether it is profitable for the foreign investor to invest in the capital importing country. Tax concessions nevertheless are relevant to the foreign investor as they enable the recovery of capital costs at a faster rate than otherwise would be possible under the tax law of the country of investment.

CHAPTER III

DOUBLE TAXATION AGREEMENT

Every sovereign state has, in theory, unlimited power of taxation. If there are any limitations upon it they are self-imposed. A country is absolutely free within its own sovereign jurisdiction to impose tax on the income of its citizens and residents wherever the source of such income may be and on all income arising from sources within its jurisdiction wherever the recipient may be.[73a] The tax legislation of a country is therefore usually so designed that tax is payable on all income received by its citizens and residents within its jurisdiction notwithstanding the source of the income and on all income from sources within its jurisdiction whether payable to persons within its jurisdiction or to persons residing outside its jurisdiction. It is usual for both the country of the source of income and the country of residence of the taxpayer to claim the right to tax the taxpayer in respect of the same income thus burdening the taxpayer with double taxation.

The tax reliefs granted by Singapore under the Act are unilateral reliefs and their effect depends on the tax laws relating to foreign income of the country of residence of the foreign investor. The tax burden with which the foreign investor is concerned with is the combined effect of the taxes levied on his foreign operations by the country of his source of income and by his country of residence. Where the foreign investor's country of residence grants relief to foreign tax paid by its resident taxpayer by way of credit

73a. A country is also entitled to impose tax on the income of its citizen wherever the source of such income and its citizen may be.

against its tax, the overall tax burden of the taxpayer is then determined by the rate of tax in the foreign investor's country of residence. The tax reliefs granted under the Act being in effect the exemption or reduction of tax which would otherwise have been payable, such exemption or reduction cannot be claimed as foreign tax which has been paid and to be credited against the tax of the foreign investor's country of residence. The effect is therefore that whatever tax is exempted by Singapore is paid to the foreign investor's country of residence and may further result in a higher burden of tax on the foreign investor in his country of residence. If the foreign investor's country of residence exempts foreign income from domestic tax then the foreign investor enjoys the full benefit of the tax reliefs granted by Singapore under the Act.

The tax relief granted under the Act in respect of interest payable on approved foreign loans and of payments relating to approved royalties, fees and other contributions are also dependent on the tax laws of the foreign investor's country of residence. Unless the tax laws of the foreign investor's country of residence provide that such exempted tax is deemed as foreign tax duly paid and is credited against the tax of his country of residence, or, where the aforesaid income being foreign income is granted exemption from tax by his country of residence, the aforesaid tax reliefs would result in the increase of the burden of tax on the foreign investor in his country of residence and would therefore be not available as tax reliefs to the foreign investor. The effect of the aforesaid tax reliefs as investment incentives may therefore be

nullified by the tax laws of the foreign investor's country of residence.

The burden of tax liability also influences the decision of the foreign investor in his choice of a foreign country as his country of investment. Discriminatory tax is a further factor which the foreign investor is concerned with when investing in foreign countries. Tax laws being within the exclusive jurisdiction of a country, the foreign investor requires the guaranty that after investing in the foreign country of his choice the tax laws will not subsequently be changed to discriminate against him or to his disadvantage thus affecting the possible returns of his investment. There is no such guaranty available under the statutory law in Singapore unless there is an existing agreement to that effect between the foreign investor's country of residence and Singapore. Unless there is some form of concrete guaranty to assure the foreign investor that he will not be subjected to discriminatory tax, all the unilateral tax reliefs granted under the Act are not positively effective as investment incentives in attracting foreign capital as there is always the fear of the possibility of a change in policy. As far as the foreign investor is concerned mere promises and assurances on the part of the government of the country attempting to attract foreign capital are not sufficient or effective in allaying the foreign investor's fear of the possibility of discriminatory tax

One of the means to eliminate if not at least to minimize, the burden of double taxation and to give the requisite guaranty that

the foreign investor will not be subjected to discriminatory tax is the conclusion of bilateral treaties to that effect by the country attempting to attract foreign capital and the capital exporting countries.

AUTHORITY TO ENTER INTO DOUBLE TAXATION AGREEMENT

In Singapore the Minister of Finance is authorized and empowered by section 49 of the Income Tax Ordinance[73] to enter into agreements with a view of affording relief from double taxation and matters relating thereto with the government of any country outside Singapore. Such agreement, however, does not have the effect of law in Singapore unless it is by order duly declared that the provisions in the agreement are effective notwithstanding anything to the contrary in the Income Tax Ordinance. Where there is therefore a conflict between the provisions of the Income Tax Ordinance and the provisions of such agreement which had been duly declared by order to be law, the provisions of such agreement prevail.

Any agreement relating to the avoidance of double taxation and matters relating thereto may provide for the following:-

1. for liability to tax by one contracting state and for exemption from tax by the other contracting state;
2. for exemption of tax from both contracting states;
3. may deem the source of income to be wholly or partly in either or both of such contracting states; and

73. Chapter 166 (Reprint: May 25, 1966).

4. may provide for the charge to tax by the contracting state in which the source is deemed to be situated of any income derived from such source.

DOUBLE TAXATION AGREEMENTS BETWEEN SINGAPORE AND OTHER COUNTRIES

Singapore has to date entered into bilateral agreements relating to double taxation with seven countries - Japan, Norway, the United Kingdom, Malaysia, Australia, Sweden and Denmark. These double taxation agreements have by order been duly declared effective as law and enforceable as part of the laws of Singapore.[74] Although it is not possible to enter into identical double taxation agreements with all countries because of the difference in economic circumstances, tax laws and the general legal systems, the double taxation agreements between Singapore and the aforesaid countries contain similar provisions which are comprehensive in nature and the differences are only in respect of details.

74. The reference given in respect of the double taxation agreements between Singapore and the following countries is the date when by order each of the respective agreement is duly notified as law in the Singapore Government Gazette:-
Japan - S.L.No.233 of 1961, September 29, 1961;
Norway - S.L.No.67 of 1966, September 9, 1966;
United Kingdom - S.L.No.12 of 1967, February 11, 1967;
Malaysia - S.L.No.97 of 1968, December 26, 1968;
Australia - S.L.No.10 of 1969, February 11, 1969;
Sweden - S.L.No.11 of 1969, February 14, 1969; and
Denmark - S.L.No.16 of 1969, March 7, 1969.
All references hereinafter made to the aforesaid double taxation agreements shall be by reference to the foreign country.
According to the Economic Development Board of Singapore negotiations are now going on for similar agreements with the United States, West Germany, France and Italy.

PURPOSE

The purpose of the double taxation agreement is to provide a scheme for the relief of double taxation on specified types of income, and to provide the assurance to the taxpayer of the contracting state who trades or invests in the other contracting state that he may do so free of the deterrent burden of double taxation. In addition the double taxation agreement limits the scope of the tax of one contracting state on the taxpayer of the other contracting state in important respects, in particular protecting the taxpayer of one contracting state from discriminatory tax by the other contracting state. Provision is also made for the exchange of information by the relevant authorities of the contracting states primarily to enable the double taxation agreement to work out smoothly but also to prevent fraud or fiscal evasion.[75]

The items of tax covered by the double taxation agreement are set out and the greater part is made up of detailed provisions designed to eliminate double taxation. The country of the source of income is defined and provision is made that either the item of income is not taxed in both contracting states or that, if it is, the aggregate amount of the tax imposed in the contracting states is reduced so that it does not exceed the amount of tax which would otherwise have been payable in the contracting state with the higher rate of tax.

75. Japan, supra note 74, Art.XV; Norway, supra note 74, Art.XVIII; United Kingdom, supra note 74, Art.19; Malaysia, supra note 74, Art.XIX; Australia, supra note 74, Art.19; Sweden, supra note 74, Art.XX; and Denmark, supra note 74, Art.XX.

The object of avoiding double taxation is achieved by two methods - exemption and credit. Some types of income flowing from one contracting state to the other contracting state, subject to certain conditions, are exempted or partially relieved from tax in one of the contracting states. Where the items of income remain fully or partially taxable in both contracting states, the tax charged in the contracting state which is the country of the source of income is normally allowed as credit against the tax charged by the contracting state which is the taxpayer's country of residence. Where the double taxation agreement so provide credit may also be given by one contracting state in respect of tax exempted in the other contracting state with a view to promoting development in that other contracting state.

RELIEF BY EXEMPTION

The main types of income material to trade and investment and to which the exemption method is applied are:-

1. trading profits not arising through a permanent establishment;
2. royalties;
3. earnings of temporary business visitors;
4. dividends; and
5. interests from industrial undertakings.

76. The items of income discussed are confined to those relevant to foreign investment and of interest to the foreign investor. Unless specified the double taxation agreements entered in by Singapore are similar in provisions.

TRADING PROFITS

The double taxation agreement provides that an enterprise of one contracting state is exempted from tax in the other contracting state in respect of its profits unless such profits are attributable to the enterprise carrying on its trade or business through a permanent establishment in the other contracting state.[77]

The term "permanent establishment" is defined in all the double taxation agreements entered into by Singapore.[78] Generally, an enterprise is deemed to have a permanent establishment in the other contracting state when it has an office, branch, factory or other fixed place of business where the business of the enterprise is carried on, but does not include the casual and temporary use of mere storage facilities. A farm, a plantation, a mine, a quarry or any other place of natural resources subject to exploitation and an agency, if the agent has and habitually exercises a general authority to negotiate and conclude contracts on behalf of the enterprise or has a stock of merchandise from which he regularly fulfills orders on its behalf constitutes a permanent establishment.

An enterprise which carries on business dealings in the other contracting state through a bona fide broker, general commission

77. Japan, supra note 74, Art.III; Norway, supra note 74, Art.IV; United Kingdom, supra note 74, Art.4; Malaysia, supra note 74, Art.IV; Australia, supra note 74, Art.5; Sweden, supra note 74, Art.III; and Denmark, supra note 74, Art.III.
78. Japan, supra note 74, Art.II(k); Norway, supra note 74, Art.II(1); United Kingdom, supra note 74, Art.2(1); Malaysia, supra note 74, Art.II(m); Australia, supra note 74, Art.4(3); Sweden, supra note 74, Art.II(g); and Denmark, supra note 74, Art.II(1).

agent, or other independent agent acting in the ordinary course of business as such is not considered to have a permanent establishment in that other contracting state. Similarly the fact that the enterprise maintains a fixed place of business exclusively for the purpose of the purchase of goods or merchandise does not of itself constitute the fixed place of business a permanent establishment. A subsidiary of a corporation carrying on trade or business in the other contracting state does not of itself constitute that subsidiary a permanent establishment of its parent corporation.

ROYALTIES[79]

The double taxation agreement provides that the contracting state where the royalty is paid is the country of the source of income and is the contracting state which grants exemption to the royalty from tax when it is paid to the recipient resident in the other contracting state. The exemption does not apply where the royalty is attributable to a permanent establishment of the recipient in the contracting state where the royalty is paid. Further, where owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalty exceeds the amount which would have been agreed by the payer and the recipient in the absence of such relationship and

79. Japan, _supra_ note 74, Art.VII; Norway, _supra_ note 74, Art.VIII; United Kingdom, _supra_ note 74, Art.8; Malaysia, _supra_ note 74, Art.VIII; Australia, _supra_ note 74, Art.10; Sweden, _supra_ note 74, Art.IX; and Denmark, _supra_ note 74, Art.VIII.

dealing with each other at arm's length, the exemption applies only to the last mentioned amount and the excess amount is liable to be taxed by the contraction state in which the royalty is paid. The above provision is directed against the benefit of the double taxation agreement being used as a means for the evasion of tax in dealings relating to royalty between particularly the parent corporation and its subsidiary.

"Royalty" under the double taxation agreement refer to any royalty, rental and other amount paid as consideration for the use of, or for the right to use, any copyright, patent, design, secret process, formula, trade-marks and other like property but does not include any royalty or other amount paid in respect of motion picture films or tapes for telecasting or of the operation of mines or quarries or of the exploitation of natural resources.

The double taxation agreement with Sweden further provides that royalties derived by a resident of Sweden from sources within Singapore are also exempted from tax in Sweden for the first five years of the double taxation agreement.[80] Thereafter fifty per cent are exempted from Swedish tax for a further period of five years. The effect of the double taxation agreement with Sweden is not only the avoidance of double taxation on royalties but also the exemption of royalties from tax in both Singapore and Sweden as the country of the source of income and the country of residence of the taxpayer respectively for the first five years from the date of effect of the double

80. Sweden, <u>supra</u> note 74, Art.XIX(6).

taxation agreement, and thereafter for the following five years exemption from tax by Singapore as the country of the source of income and partial exemption by Sweden as the country of residence of the taxpayer.

In the double taxation agreement with Denmark, royalties paid to a resident of Denmark from sources within Singapore are exempted from Danish tax but Denmark retains the right take such royalties into account in the determination of the rate of tax payable by its resident.[81]

The double taxation agreement with Norway provides that royalties paid to a resident of Norway from sources within Singapore are exempted from Norwegian tax which in effect means that such royalties are granted total exemption by the country of the source of income as well as the country of residence of the taxpayer.[82]

In the double taxation agreements with Japan, the United Kingdom and Australia royalties are exempted from tax only by the contracting state which is the country of the source of income.

The provision for the exemption of royalties from tax by Singapore as the country of the source of income under the double taxation agreement is an added relief to the partial relief granted by Singapore unilaterally under the Act. Royalty under the double taxation agreement is not limited to approved royalty as defined under the Act but refers to a wider class of royalty generally.

81. Denmark, supra note 74, Art.XVII(4).
82. Norway, supra note 74, Art.XVII(5).

EARNINGS OF TEMPORARY BUSINESS VISITORS[83]

Provision is made in the double taxation agreement for the individual making a short visit from one contracting state to the other contracting state to be exempted from tax in the country visited provided the aggregate period of the visit does not exceed 183 days. The double taxation agreement with Malaysia provides for an aggregate period not exceeding 120 days. No added advantage is given as the Singapore tax law contains a similar provision. A resident of Malaysia is in fact worse off as the lesser period of stay in the double taxation agreement applies.

DIVIDENDS

Under the tax law of Singapore dividends distributed to a foreign shareholder is subject to tax at the rate of forty per cent. The double taxation agreements entered into by Singapore contain different arrangements with the respective contracting countries in respect of dividends.

In the double taxation agreement with Japan, dividends paid by a corporation of one contracting state to the resident of the other contracting state are taxable in the first-mentioned contracting state at a rate not exceeding fifteen per cent of the dividends.[84] Where the recipient is a corporation which controls, directly or indirectly, not less than fifty per cent of the entire voting power of

83. Japan, supra note 74, Art.X; Norway, supra note 74, Art.XII; United Kingdom, supra note 74, Art.12; Malaysia, supra note 74, Art.XII; Australia, supra note 74, Art.12; Sweden, supra note 74, Art.XV; and Denmark, supra note 74, Art.XII.
84. Japan, supra note 74, Art.VI.

the distributing corporation for at least six months immediately prior to the date when the dividends become payable, the rate of tax chargeable must not exceed ten per cent of the dividends.

The double taxation agreement with Norway provides for dividends paid by a company resident in one contracting state to the resident of the other contracting state to be exempted from tax in the other contracting state.[85]

The double taxation agreement with the United Kingdom contains a similar provision as that with Norway but it further provides that if the recipient owns ten per cent or more of the class of shares in which the dividends are paid then the exemption from tax is not applicable unless such shares have been held for a period of twelve months or more immediately prior to the distribution of the dividends or unless the recipient shows that the shares were acquired for *bona fide* commercial reasons and not primarily for the purpose of securing the benefit of the exemption under the double taxation agreement.[86]

In the double taxation agreement with Malaysia no provision is made for the exemption of dividends paid by a company resident in one contracting state to a recipient of the other contracting state by the first-mentioned contracting state. However, it is provided that any tax on dividends with-held by the first-mentioned contracting state is to be allowed as a tax set-off by such first-mentioned contracting state in accordance with its tax law in

85. Norway, *supra* note 74, Art.VII.
86. United Kingdom, *supra* note 74, Art.7.

favour of the recipient in the other contracting state.[87] The effect of the above provision is in fact the exemption of dividends from tax by the contracting state in which the company distributing the profit is situated.

The double taxation agreement with Australia provides that dividends paid by a company resident in Singapore or Malaysia out of profits derived from sources in Singapore to a resident of Australia who is beneficially entitled to such dividends are exempted from any tax in Singapore which may be chargeable on such dividends in addition to the tax chargeable in respect of the profits of the company out of which such dividends are paid.[88] If Singapore subsequent to the signing of the double taxation agreement imposes tax on such dividends, such tax must not exceed fifteen per cent of the gross amount of such dividends.

The double taxation agreements with Sweden and Denmark respectively provide that dividends paid by a company resident in one contracting state to the resident of the other contracting state are exempted from tax in the first-mentioned contracting state.[89] Should Singapore subsequently impose tax on dividends paid by a company resident in Singapore to a resident of Denmark or Sweden, such tax must not exceed the rate of fifteen per cent of the gross amount of such dividends. Where the dividends are paid by a company in Singapore to a parent company resident in Sweden or Denmark, the tax imposed by Singapore must not exceed the rate of ten per cent of the gross

87. Malaysia, <u>supra</u> note 74, Art.VII.
88. Australia, <u>supra</u> note 74, Art.8.
89. Sweden, <u>supra</u> note 74, Art.VII; Denmark, <u>supra</u> note 74, Art.VI.

amount of such dividends. The term "parent company" is defined in both the double taxation agreements to mean a company resident in one contracting state owning directly or indirectly not less than twenty-five per cent of the share capital of the company distributing the dividends and resident in the other contracting state.

In all the double taxation agreements the exemption does not apply where the dividends are attributable to a permanent establishment of the recipient in the contracting state in which the company distributing the dividends is situated.

INTEREST

The double taxation agreements entered into by Singapore differ in their provisions in respect of interest from industrial undertakings. However, in all the double taxation agreements the contracting state in which the interest is paid is deemed to be the country of the source of income.

In the double taxation agreements with Norway and the United Kingdom no mention is made in respect of interest except for the provision that the contracting state in which the interest is paid is the country of the source of income. However, if interest is paid to an enterprise of the other contracting state and forms part of its trading profits, such interest is exempted from tax in the country of the source of income unless it is attributable to a permanent establishment of the recipient enterprise in the country of the source of income.

The double taxation agreements with Japan, Malaysia, Australia, Sweden and Denmark contain the provision that where owing to the

special relationship between the payer and the recipient or between both of them and some other person, the amount of interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship and dealing with each other at arm's length, the exemption from tax applies only to the last-mentioned amount and the excess shall be liable to tax accordingly in the contracting state which is the country of the source of income.[90] This limitation prevents the provisions of the double taxation agreement from being used as a means of evasion of tax especially in dealings between the parent company and its subsidiary.

The double taxation agreement with Australia further provides that the contracting state which is the country of the source of income has the right to tax interest paid to the resident of the other contracting state at a rate not exceeding ten per cent of the gross amount of such interest.[91] Interest is also defined in the double taxation agreement with Australia to mean interests and amounts in the nature of interest, on bonds, securities, debentures or any form of indebtedness.[92]

Under the double taxation agreements with Sweden and Denmark the rate of tax chargeable by the contracting state which is the country of the source of income must not exceed fifteen per cent of

90. Japan, supra note 74, Art.VII; Malaysia, supra note 74, Art. XV; Australia, supra note 74, Art.9; Sweden, supra note 74, Art.VIII; and Denmark, supra note 74, Art.VII.
91. Australia, supra note 74, Art.9.
92. Ibid.

the gross amount of such interest. Further, where the enterprise paying the interest is engaged in an industrial undertaking relating to the manufacture, assembling and processing, construction, civil engineering and shipbuilding, production of electricity, hydraulic power, gas or the supply of water, or fishing, the rate of tax must not exceed ten per cent of the gross amount of the interest.

In the double taxation agreement with Japan, interest paid to the resident of one contracting state by an enterprise resident in the other contracting state engaged in an industrial undertaking is exempted from tax in the other contracting state.[93] The term industrial undertaking in the double taxation agreement with Japan refers to manufacturing, processing, ship-building, ship-breaking and ship-docking, mining including the working of a quarry or any other source of mineral deposits, plantation, agriculture, forestry and any other undertaking which may be declared an industrial undertaking for the purposes of tax relief in the double taxation agreement by the competent authority of the contracting state in which the undertaking is situated.

RESIDENCE IN MORE THAN ONE CONTRACTING STATE

Exemptions under the double taxation agreement are not available to taxpayers who are resident for tax purposes in both contracting states. Such taxpayers can seek relief only by way of credit for

93. Japan, supra note 74, Art.VII.

the tax paid to one contracting state against the tax of the other contracting state in accordance with the provisions of the double taxation agreement.

RELIEF BY CREDIT

Relief by way of credit is given in respect of income which remains taxable in both contracting states. This form of relief is given mainly in the following types of income:-

1. trading profits of a person resident in one contracting state attributable to his permanent establishment in the other contracting state;
2. dividends paid to a person resident in one contracting state by a company resident in the other contracting state;
3. income arising to a person resident in one contracting state from real property in the other contracting state; and
4. any income arising from one contracting state to a person resident in the other contracting state when the conditions of the double taxation agreement under which it would have been exempted by one contracting state are not fulfilled as in the case of a taxpayer resident in both contracting states.

The general rule governing the grant of credit is that the contracting state which is the country of residence of the taxpayer gives credit against its tax in respect of any tax paid by its resident taxpayer to the other contracting state. The extent and conditions of such credit differ in detail in the double taxation agreements entered into by Singapore.

In the double taxation agreement with Norway a blanket provision provides that where a resident of Norway derives income from sources within Singapore other than profits relating to the operation of ships and aircraft, and that income in accordance with the provisions of the double taxation agreement is subject to tax in Singapore, Norway shall exempt such income from Norwegian tax.[94] In the case of profits relating to the operation of ships and aircraft, the double taxation agreement provides that where the enterprise of one contracting state operating ships and aircraft in international traffic derives profits from such operations carried on in the other contracting state, the tax charged in the other contracting state in respect of such profits shall be reduced by an amount equal to fifty per cent thereof, and the reduced amount of the tax payable on such profits shall be allowed as credit against the tax charged in respect of such profits by the first-mentioned contracting state which is the country of residence of the taxpayer.

94. Norway, supra note 74, Art. XVII(3).

In the double taxation agreement with Japan, the credit granted against Japanese tax in respect of the tax payable by its resident on income derived from sources within Singapore is limited to an amount which must not exceed that proportion of Japanese tax which that income or the entire income subject to Japanese tax, whichever is the lesser bears to the entire income subject to Japanese tax.[95] Further, where the income is dividend paid by a corporation resident in Singapore, the amount of Singapore tax payable by the corporation on the profits out of which the dividend is paid is not deemed to be tax payable by the taxpayer and credit is not granted in respect of such tax accordingly.

In the double taxation agreement with the United Kingdom, a resident of the United Kingdom who received income in the form of an ordinary dividend paid before April 6, 1966 by a company resident in Singapore is granted credit against British tax in respect of not only the tax paid on such dividend in Singapore but also the Singapore tax payable by the company in respect of its profits out of which the dividend is paid.[96] Where the dividend is paid on participating preferential shares and representing both dividend at the fixed rate to which the shares are entitled and an additional participation in profits, credit given by the United Kingdom is in respect of the Singapore tax payable by the company only for the amount exceeding the dividend at the fixed rate. Where the dividend is paid after April 6, 1966 the credit granted does not take into account

95. Japan, <u>supra</u> note 74, Art.XIV(3)(a).
96. United Kingdom, <u>supra</u> note 74, Art.18(3)(b) and (c).

Singapore tax which is not specifically chargeable on the dividend but is tax, whether deducted from the dividend or not, chargeable in respect of the profits or income of the company paying the dividend. However, where the recipient resident in the United Kingdom is a company controlling directly or indirectly not less than ten per cent of the voting power of the Singapore company, the credit granted by the United Kingdom takes into account, in addition to any Singapore tax chargeable specifically on the dividend, the Singapore tax payable in respect of the profits by the company distributing the dividend.

The double taxation agreement with Malaysia provides that for the purposes of tax credit by Malaysia, the amount to be credited is to be arrived at in accordance with the tax laws in Malaysia and not the actual amount of Singapore tax paid by its resident on income derived from sources within Singapore.[97]

The double taxation agreement with Australia provides that where the income derived from sources within one contracting state by a resident of the other contracting state is in the form of dividend, the tax credit granted by the other contracting state is applicable only to tax paid to the first-mentioned contracting state on the dividend and not the tax paid in respect of the profits out of which the dividend is paid.[98] However, where the recipient is a company resident in Australia and owns ten per cent of the paid-up share capital

97. Malaysia, *supra* note 74, Art.XVIII(3).
98. Australia, *supra* note 74, Art.18.

in the company resident in Singapore distributing the dividend, the recipient company is entitled to a rebate in its assessment at the average rate of tax payable in respect of the dividend included in its taxable income.

The tax credit granted by Sweden under the provisions of the double taxation agreement for any Singapore tax paid by its resident on income derived from sources within Singapore is limited to an amount which must not exceed that part of the Swedish tax as computed before the deduction was given.[99] However, dividend paid by a company resident in Singapore to a company resident in Sweden is exempted from Swedish tax subject to the provision that the principal part of the profits of the company paying the dividend must arise, directly or indirectly, from business activities other than the management of securities and other similar movable property and that such activities are carried on within Singapore by the company paying the dividend or by a company in which it owns at least twenty-five per cent of the share capital.

Credit is also provided against Swedish tax in respect of tax payable in Singapore on the following items of income from sources within Singapore in the case of:-

1. dividends, an amount of fifteen per cent of the net amount of the dividend received. If, however, Singapore imposes tax on dividend payable by a company resident in Sweden in addition to the tax chargeable in respect of the profits

99. Sweden, supra note 74, Art. XIX.

or income of the company paying such dividend, the amount to be credited against Swedish tax is fifteen per cent of the gross amount of the dividend received;

2. interest paid by an enterprise resident in Singapore and engaged in an industrial undertaking as defined in the double taxation agreement,[100] the amount to be credited against Swedish tax is fifteen per cent of the gross amount of the interest received.

The above amounts credited, however, must not exceed that part of the Swedish income tax as computed before the deduction is given which is appropriate to the dividend or the interest and is applicable only in the first ten years from the date of effect of the double taxation agreement.

The double taxation agreement with Denmark provides that any income received by a resident of Denmark from source within Singapore and which according to the double taxation agreement is taxable in Singapore is exempted from Danish tax subject, however, to Denmark having the right to take into account such income in the determination of its rate of tax.[101] Should Singapore impose tax on dividend paid by a company resident in Singapore to a resident of Denmark in addition to the tax chargeable in respect of the profits or

100. Sweden, supra note 74, Art.VIII, industrial undertaking is defined to mean an undertaking engaged in manufacturing, assembling and processing, construction, civil engineering and shipbuilding, production of electricity, hydraulic power, gas or the supply of water, or fishing.
101. Denmark, supra note 74, Art.XVII(3)(a).

income of the company paying such dividend, the exemption from Danish tax is applicable only to such dividend paid to a company resident in Denmark and which owns at least twenty-five per cent of the share capital of the company paying such dividend.

TAX SPARING

In the double taxation agreement with Japan, Norway, the United Kingdom and Australia provision is made for tax sparing by the aforesaid countries by crediting against the respective tax of the aforesaid countries in favour of their taxpayer Singapore tax which would have been payable by their taxpayer on income derived from sources within Singapore but for the tax reliefs unilaterally granted by the Singapore government to promote development therein.

The double taxation agreement with Norway provides for the exemption from Norwegian tax of all profits or dividends which have been exempted from Singapore tax under the repealed Pioneer Industries Ordinance[102] or any other legislation of a substantially similar character which may be enacted in lieu of that Ordinance.[103] Thus tax exemptions granted under the Act comes within the above provision.

In the double taxation agreement with Australia the tax sparing is limited only to income in the nature of interest or royalties in respect of which an exemption or reduction of tax has been granted under the Act in Singapore or any provision which may subsequently be enacted granting exemption from or reduction of tax

102. No.1 of 1959.
103. Norway, *supra* note 74, Art.XVII(4)(a).

which may be agreed by the contracting states is deemed to be Singapore tax which have been duly paid, or the Singapore tax paid is deemed to have been increased by the amount equal to the amount by which the Singapore tax that otherwise would have been payable is reduced by the exemption or reduction granted.[104] The tax sparing provided for in the double taxation agreement with Australia is only for a limited period and does not apply to any income derived after the year of income that ends on June 1974 or any later date that may be agreed upon by the contracting states.

In the double taxation agreement with Japan, for purposes of tax sparing against Japanese tax in respect of any tax payable by a resident in Japan on income derived from sources within Singapore, the amount of Singapore tax exempted under the Repealed Pioneer Industries Ordinance or any subsequent legislation of a similar nature is deemed to have been paid by the taxpayer resident in Japan and credit against Japanese tax is granted for such exempted amount of Singapore tax accordingly.[105] However, the amount allowed as credit against Japanese tax must not exceed the scope of the benefit accorded under the provisions of the current legislations in Singapore granting such tax exemption as in effect on the date of the signing of the double taxation agreement.

The double taxation agreement with the United Kingdom provides that Singapore tax payable by a taxpayer resident in the United

104. Australia, <u>supra</u> note 74, Art.18(3) and (4).
105. Japan, <u>supra</u> note 74, Art.XIV(3)(b), (c) and (d).

Kingdom and for which credit is given against British tax includes any amount which would have been payable as Singapore tax for any year of assessment but for the exemption or reduction of the tax granted for that year or part thereof under the provisions of the repealed Pioneer Industries Ordinance so far as they were in force at the date of the signing of the double taxation agreement, or have been modified only in minor respects so as not to affect their natural character or any other provisions which may subsequently be made which are agreed by the contracting states to be substantially similar in character.[106] In respect of royalties which have been granted exemption or reduction from Singapore tax, credit against British tax is given in respect of an amount not exceeding a sum equivalent to twenty per cent of the Singapore tax which would have been payable but for the exemption granted.

The effect of the aforesaid tax sparing provisions enables the foreign investors from the aforesaid countries to fully enjoy the benefits of the unilateral tax reliefs granted by Singapore under its investment incentive law.

The double taxation agreement made with Malaysia in 1966 provided for reciprocal arrangements whereby a taxpayer resident in Malaysia is exempted from Malaysian tax on income derived from sources within Singapore which is in the form of profits or dividends which have been exempted from Singapore tax under the investment incentive laws of Singapore.[107]

106. United Kingdom, supra note 74, Art.18(4).
107. Singapore Government Gazette, S.L.No.173 of 1966, Art.VII(3).

A taxpayer resident in Singapore is likewise exempted from Singapore tax on profits or dividends which have been exempted from Malaysian tax under the provisions of any law for the time being in force in Malaysia or any part thereof relating to the exemption of of profits or dividends of pioneer industries. The subsequent double taxation agreement with Malaysia made in 1968 which replaced the double taxation agreement of 1966 made no reference whatsoever to the tax reliefs granted by either contracting state under its laws to promote industrial development

EQUAL TREATMENT

Except for the double taxation agreements with Malaysia and Australia which are silent on the matter, all the other double taxation agreements contain the provision that the citizens of one contracting state are not to be discriminated against by the other contracting state under the tax laws of the respective contracting states and are not to be subjected to any taxation or any requirement connected therewith which is other, higher or more burdensome than the taxation or connected requirements to which citizens of that other contracting state in the same circumstances are or may be subjected to.[108] The taxpayer resident in the other contracting state, if an individual, is by virtue of the equal treatment provision subjected to the graduated scale of tax applicable to the individual taxpayer resident in Singapore instead of the flat rate of

108. Japan, supra note 74, Art.XIX; Norway, supra note 74, Art.XIX; United Kingdom, supra note 74, Art.20; Sweden, supra note 74, Art.XXI; and Denmark, supra note 74, Art.XVII.

forty per cent on every chargeable Singapore dollar which is applicable to all taxpayers who are non-residents of Singapore.[109] Where the taxpayer is a company no added benefit is given under the above equal treatment provision in term of the current rate of tax payable as a company whether a resident or a non-resident of Singapore is subjected to the flat rate of forty per cent on every chargeable Singapore dollar.[110] However, the contracting states are not obliged to grant to the taxpayer resident in the other contracting state the personal allowances, reliefs and reductions which are for tax purposes available under the respective tax laws of the contracting states only to their citizens.[111]

ADMINISTRATIVE REMEDY

All the double taxation agreements entered into by Singapore confer the right to the taxpayer of the contracting states to present his case to the competent authority of the contracting state

109. Income Tax Ordinance, Chapter 166 (Reprint: May 25, 1966), ss.42 and 43(b). The rates of income tax payable by a resident taxpayer in Singapore on the chargeable income are as follows:-

Chargeable Income	Rate
For every dollar of the first S$ 2,500	6%
For every dollar of the next S$ 2,500	9%
For every dollar of the next S$ 2,500	12%
For every dollar of the next S$ 2,500	15%
For every dollar of the next S$ 5,000	20%
For every dollar of the next S$ 5,000	23%
For every dollar of the next S$ 5,000	25%
For every dollar of the next S$ 10,000	30%
For every dollar of the next S$ 15,000	40%
For every dollar exceeding S$ 50,000	50%

110. Income Tax Ordinance, *supra* note 109, s.43(b).
111. *Supra* note 108.

which is his country of residence when he can prove that the action of the competent authority of either contracting state has resulted or is likely to result in double taxation.[112] On a prima facie case being made out the competent authority of the contracting state which is the taxpayer's country of residence is empowered under the double taxation agreement to come to an agreement with the competent authority of the other contracting state with a view to avoiding the aforesaid double taxation. The double taxation agreement does not impose any obligation on the competent authorities of the contracting states to give the aggrieved taxpayer any opportunity to be heard prior to reaching an agreement. If the taxpayer is aggrieved by the decision, his remedy is under the tax laws of the contracting state which makes the assessment.

Discretionary power under the double taxation agreement is given to the competent authorities of the contracting states which are administrative bodies to dispose of matters judicial arising under the double taxation agreement, including difficulties or doubts arising out of the interpretation or application of the double taxation agreement to the facts of a case. This is justified on the ground of making an international agreement between two sovereign states workable without the necessity of having to submit every dispute to be resolved by an international tribunal.

112. Japan, supra note 74, Art.XVI; Norway, supra note 74, Art.XX; United Kingdom, supra note 74, Art.21; Malaysia, supra note 74, Art.XX; Australia, supra note 74, Art.20; Sweden, supra note 74, Art.XXII; and Denmark, supra note 74, Art.XIX.

DURATION AND TERMINATION

Except for the double taxation agreements with Malaysia and Denmark, all the double taxation agreements entered into by Singapore are now determinable at any time by either contracting state giving six months written notice on or before June 30.[113] The double taxation agreements with Malaysia and Denmark are determinable by the same procedure after the year 1974.[114]

SUMMARY

The provisions of the double taxation agreement generally provide for the prevention of double taxation and discrimination by one contracting state against the taxpayer of the other contracting state. The details of the provisions depend on the interests and priorities of the contracting states. It is relevant to note that the double taxation agreements made with Malaysia and Australia respectively do not contain a provision against the discrimination by one contracting state against the national of the other contracting state. Singapore was able to secure full tax sparing for the tax relief unilaterally granted under her investment incentive law in the double taxation agreement with Norway. Limited tax sparing is also secured in the double taxation agreements with Australia, Japan and the United Kingdom. If Singapore has been able to obtain full tax sparing for

113. Japan, <u>supra</u> note 74, Art.XX; Norway, <u>supra</u> note 74, Art.XXII; United Kingdom, <u>supra</u> note 74, Art.24; Australia, <u>supra</u> note 74, Art.22; Sweden, <u>supra</u> note 74, Art.XXIV.
114. Malaysia, <u>supra</u> note 74, Art.XXII; Denmark, <u>supra</u> note 74, Art.XXIII.

her unilateral tax relief, the investors from the countries which have entered into double taxation agreements with her would then have the full benefit of the tax concessions offered under her investment incentive law. The tax laws of the aforesaid countries would then have no bearing on the effect of the tax concessions under the investment incentive law of Singapore.

The double taxation agreement is of effect only if the contracting states honour the provisions therein. The provisions must also operate for a sufficient period of time before they can be considered of any profound effect. The double taxation agreements made with Japan, Australia, Norway, Sweden and the United Kingdom are now determinable at any time by either contracting states. The double taxation agreement with Malaysia and Denmark are determinable at any time after 1974. It is conceivable that should there be a change in the circumstances and needs of either contracting states, the double taxation agreement is likely to be determined and replaced by a new agreement. Thus the double taxation agreement made with Malaysia in 1966 was determined and replaced by another agreement in 1968 which omitted the important provision for tax sparing.[115] It is therefore questionable whether the foreign investor can safely depend on the provisions of the double taxation agreement in calculating and projecting his tax liability on income from sources within Singapore.

115. See above p.60.

The double taxation agreement is therefore of limited benefit depending on the terms and period of duration. Like any other international agreement, it is also dependent on the contracting states observing the provisions therein before any benefit can be derived therefrom.

CHAPTER IV

INVESTMENT CLIMATE

Tax incentives granted by a capital importing country are not the only influencing factor in attracting foreign capital although they are material in relation to the possible returns of the investment to the foreign investor.[116] The investment climate of the capital importing country is another influencing factor in determining whether the foreign investor considers it worth the extra effort to invest in a foreign country where the economic conditions and play of market forces are in most cases alien to him. The investment climate does not depend only on the basic facilities available such as electric power, good transportation and a reasonable market to ensure profitable returns but also the actions of the government of the capital importing country which are decisive in creating either a conducive or adverse investment climate. Governmental actions may be in the form of controlling the types of investment which the foreign investor can participate in with the further requirement for local participation and employment of local labour in accordance with its national economic programme.

Governmental interference is not a new idea and neither is it confined only to the underdeveloped and developing countries. In all countries there is governmental interference in the economy of

116. See generally, Fatouros, Obstacles to Private Foreign Investment in Underdeveloped Countries, (1961) 2 Current Law and Social Problems 194-242; Brandon, Legal Deterrents and Incentives to Private Foreign Investments, (1958) 43 Grotius Society 39-60.

the country and the difference is only a question of degree.[117] Governmental interference also need not necessarily be an obstruction. In the underdeveloped and developing countries, the weakness of the private sector in the country's economy is one of the chief factor for the high degree of governmental interference. In order to ensure progress and development in the country's economy, the government is forced to be directly involved when the private sector is reluctant to respond and plan the country's economy to ensure that the country does not suffer particularly from an adverse balance of payments. This would mean that the government has to impose certain restrictions to ensure that investments, especially foreign investments in the country do not have the effect of bringing about an adverse balance of payments. Exchange control restrictions are therefore necessary but they give rise to the foreign investor's fear that his right to remit profits or to repatriate his capital to his home country should he decide to assign, contract or wind up his investment would be adversely affected by exchange control restrictions. Exchange control restrictions may also make it difficult to employ the necessary foreign personnel as the remuneration of such foreign personnel may not be permitted to be remitted to their home country.

Governmental interference and restrictions may also be in the form of the ratio of local labour required to be employed in any foreign-owned venture, compulsory local participation in a proportion

117. For a theoretical statement of the wider issues involved see Stone, The Myths of Planning and Laissez-Faire: a Re-Orientation, (1949) 18 George Washington Law Review 1.

of the shares and control of the business thus affecting the running of the foreign-owned business. These are often referred to as "creeping expropriation" being the more subtle forms whereby the government forces the control of the foreign-owned business out of the foreign investor's hand without the overt act of expropriation.

Expropriation is the most extreme form of governmental interference with private property. In principle private property is subject to the municipal law of the sovereign state in which it is situated and it is left to every sovereign state to decide for itself on its internal politics, social and economic structures the need to expropriate property including those belonging to foreigners within its jurisdiction. However, in accordance with international law, property belonging to foreigners may be expropriated only in the public interest without unjustifiable discrimination and on payment of full or adequate, prompt and effective compensation. To the foreign investor the above is not adequate protection as he is dependent on his state being willing to support his claim on the international level against the expropriating state after he has exhausted all local remedies which in most cases is time consuming and means in term of business loss of income. The willingness of the injured foreign investor's state to proceed with the claim on the international level is also dependent on politics besides the jurisdiction of the international tribunal and the willingness of the expropriating state to submit to such process. Further, any award made in favour of the injured foreign investor's state does not automatically devolve to the benefit of the injured foreign investor but is

at his state's disposal. The enforcement of the award is also at the discretion of the injured foreign investor's state.

The efficiency of the bureaucracy of the capital importing country is a further influencing factor on the investment climate. Should there be inefficiency resulting in undue delay in the issue of, for example, permits for imports of the required machinery and raw material, residence and work permits for the necessary expert foreign personnel and other matters relevant to the foreign investor's business would result in the foreign investor's business being adversely affected. The foreign investor is also highly suspicious that such delays may be deliberate discriminating acts against him. In such circumstances it is difficult to define the violation of the rights of the foreign investor and evaluate the amount of loss to his business which can be said to have resulted from such events.

The above are only some of the factors influencing the foreign investor in his decision to invest abroad. Generally, social, economic, legal and political factors of a country influence the inflow of foreign investment. It is intended to discuss only the legal aspects of the rules and regulations governing investment and which therefore have a bearing on whether foreign investors will be favourably influenced to invest in Singapore.

GOVERNMENTAL PARTICIPATION

As part of its industrialization programme, the Singapore government has set up organizations which are not only responsible for

drawing up the blue prints of its industrialization programme but also to provide related services in order to create a healthy investment climate in Singapore. The Singapore government is aware that investment incentives in the form of tax reliefs alone are not sufficient inducement and that the foreign investors who respond and invest in Singapore must also be assured of full co-operation and support at all levels and sectors of the government complex and not to be subjected to unnecessary red tape.[118] The Singapore government has therefore gone to great length and pains through the Economic Development Board (hereinafter referred to as "the EDB") to impress potential investors of its efficiency and ability to dispense with red tape.[119] At the same time, investors are not rushed but are allowed sufficient opportunity to see the potentialities of Singapore for themselves.

The EDB was established primarily to carry out the preliminary research and plan the industrialization programme of Singapore. It is therefore responsible for determining the types of industry which should be encouraged to be established in Singapore and the site of the industrial areas. It is not a pre-requisite that the foreign investor must consult the EDB before embarking on the investment of his choice. However, by consulting the EDB, the foreign investor is able to draw on the research and knowledge of the EDB in respect of

118. Far Eastern Economic Review, November 22, 1966, p.592.
119. Texas Instruments, an American concern, for example was established in Singapore 50 days after its Board of Directors had given the go-ahead, Far Eastern Economic Review, Yearbook 1970, p.254.

the potentialities of his proposed investment and save in terms of time and money which he would otherwise have to incur in order to carry out a preliminary survey.

The foreign investor is also able to verify from the EDB the availability of the necessary equipment and labour and whether his proposed project will qualify for the tax reliefs granted under the investment incentive laws in Singapore. Matters relating to the Singapore government's policies, rules and regulations relating to business may also be clarified so that the foreign investor is not subjected to unpleasant surprises after committing himself to his proposed project.

Besides the above the EDB, prior to the establishment of the Development Bank of Singapore, was also responsible for industrial financing from funds made available by the Singapore government. The availability of financial aid is of importance to the investor, whether foreign or local, as any paying industrial project is usually of a sizeable nature and requires considerable capital outlay.

The Development Bank of Singapore (hereinafter referred to as "the DBS") was incorporated in 1968 for the primary purpose of taking over the industrial financing programme of the EDB as a result of the need of increased industrial financing caused by the establishment of more industrial enterprises. The resources available to the EDB were only through the Singapore government but in the case of the DBS, with the participation of the private sector, more funds are available for industrial financing both directly from the

Singapore government and through credits from international sources.[120]

The primary function of the DBS is to provide finance to manufacturing and processing industries and to assist in the establishment of new industries as well as to modernize existing ones. The DBS, as a matter of policy, supports other projects in line with the development policy of the Singapore government. The industrial financing of the DBS takes the form of medium and long term loans, equity participation and guaranties of loans raised by entrepreneurs from other sources.[121]

120. The share ownership of the DBS as at the end of June 1969 was as follows:-

	S$ million
Government of Singapore	48.6
Commercial Banks	25.9
Insurance companies and other financial institutions	7.6
Other companies and members of the public	17.6

The Singapore government in addition provided the first line of credit of S$30 million to meet loans committed by the EDB and transferred to the DBS and new loans. A second line of credit of S$50 million was subsequently provided again by the Singapore government. DBS Annual Report 1968,pp.5 and 6.

By the end of 1969 the DBS has entered into the following agreements:-

(a) loan from the Asian Development Bank for S$30 million;
(b) loan from the World Bank for S$15 million; and
(c) loan from Kreditanatalt fur Wiederaufbau for S$8 million.

DBS Annual Report 1969, p.14

It is relevant to notethat clause 73 of the Memorandum of Association of the DBS provides that "so long as any monies shall be on loan to the DBS by the Singapore Government and/or the EDB the Government of Singapore or EDB shall be entitled to appoint and remove one Director who shall hold office at the pleasure of the Government of Singapore and/or the EDB".

121. As at December 31, 1969 the distribution of DBS industrial financing is as follows:-

Manufacturing industries ... 73.8%
Service industries .... 25 %
Primary industries 1.1%

The total amount of industrial financing was S$264.6 million. DBS Annual Report 1969, p.10.

In general the DBS is prepared to consider financing any project which will contribute significantly to the economic growth of Singapore. Specific factors which the DBS takes into consideration when evaluating applications for financial assistance includes the following - efficient management, financial profitability, economic viability, technical feasibility, employment creation and skill formation.[122] The DBS operates on a business basis and does not discriminate between foreign and local investors in its industrial financing.[123]

In addition the DBS offers a full range of technical and managerial consultant services beside banking facilities. The managerial consultant services cover assistance at all stages - in the planning and execution of an investment project, assistance in joint ventures and shareholders negotiation, negotiation of purchase and marketing agreements and formation of companies with related, secretarial and registrar's services. The DBS also offers underwriting and issuing house facilities and advice on tax and real estate matters. In the field of banking facilities, the DBS offers particularly to new companies short term facilities and import and export financing and has agency arrangements with correspondents in the the principal cities of the world.

122. Letter from DBS to Mah, November 10, 1970.
123. As at December 31, 1969, out of 90 firms assisted by the DBS, 52 are joint ventures and 12 are wholly owned subsidiaries of foreign companies. Financial assistance of all forms to these 64 firms constituted 75% or almost S$200 million of total assistance committed. DBS Annual Report, 1969, p.12.

The Singapore government has also made a concerted effort to find markets for Singapore manufactured goods to ensure that its industrialization programme and investment incentives are not nullified by the lack of markets. To date Singapore has entered into bilateral trade agreements with eleven countries.[124] The trade agreements are basically commercial treaties intended primarily to facilitate trade and commerce and to provide protection for traders and their goods.

With the exception of the trade agreement with Zambia, the other trade agreements provide for the most favoured nation treatment to be accorded by one contracting state to the other contracting state in all matters relating to trade and especially pertaining to the granting of licences for import and export of goods listed in the trade agreements into the respective contracting state in

124. The reference given in respect of the trade agreements entered into by Singapore with the following countries is in accordance with their notification in the Singapore Government Gazette except where such trade agreement has not been duly notified, the date of signing the agreement is given.
The Union of the Soviet Republic (USSR), Singapore Treaty Series T 1 of 1968;
Bulgaria, Singapore Treaty Series T 3 of 1968;
Poland, Singapore Treaty Series T 4 of 1968;
Israel, Singapore Treaty Series T 5 of 1968;
Cambodia, Singapore Treaty Series T 1 of 1969;
United Arab Republic (UAR), Singapore Treaty Series T 1 of 1970;
Rumania, January 31, 1967;
Indonesia, February 18, 1967;
Hungary, March 1, 1967,
North Korea, May 13, 1967; and
Zambia, May 12, 1967.
Hereinafter refernces to the trade agreements are by the countries with which Singapore has made the trade agreements.

accordance with and subject to the laws and regulations in force in either contracting states. The most favoured nation treatment is, however, subject to certain exceptions. Generally it is not applicable to the preferences and advantages accorded by Singapore within the framework of the Commonwealth of Nations and to advantages resulting from a Customs Union of which either contracting state to the trade agreement is or may thereafter be a party or to advantages which either of the contracting state has granted or may grant to its neighbouring countries.[125]

The trade agreements also contain the important provision that all payments between the two contracting states in respect of any commercial transactions are to be effected in freely convertible

125. USSR, supra note 124, Art.1 and Exchange of Letters between Singapore and the USSR, April 2, 1966. Bulgaria, supra note 124, Art.1 and Exchange of Letters between Singapore and Bulgaria, May 5, 1966.

The most favoured nation treatment further does not apply to:-

(a) Advantages which result from a Free Trade Zone to which either of the contracting states is or may thereafter be a party - Poland, supra note 124, Art.1 and Exchange of Letters between Singapore and Poland, June 7, 1966; Hungary, supra note 124, Art.1; and Rumania, supra note 124, Art.1 and Exchange of Letters between Singapore and Rumania, January 31, 1967.

(b) Preferences accorded by Singapore to the Republic of Ireland and the Union of Burma - Israel, supra note 124, Art. II(3) and Exchange of Letters between Singapore and Israel, April 24, 1968.

(c) Preferences accorde by the UAR to member states of the Arab League and prefernces accorded by Singapore to the Republic of Ireland and the Union of Burma - UAR, supra note 124, Art.III(3).

(d) Advantages and facilities accorded by either contracting states to those countries with which it has vital relations, preferences accorded by Singapore to the Republic of Ireland and the Union of Burma and preferences accorded by Cambodia to other countries before the signature of the trade agreement - Cambodia, supra note 124, Art.III.

currency which are to be made in accordance with the exchange control in force in each country.

The provision of the trade agreements, however, do not preclude the application by either contracting state of prohibitions or restrictions of any kind which are directed to the protection of inter alia its essential interests. The above provision is wide enough to be stretched to cover anything which may be called security interest and could conceivably include internal security and possibly economic security. If the above is thus used, it could contradict out whatever assurances or guaranties provided for in the trade agreements.

Except for the trade agreement with the USSR, no provision has been made in the other trade agreements in the event of a dispute relating to any commercial transactions. The trade agreement with the USSR provides that the government of the USSR will assume responsibility for all commercial transactions which are concluded or guaranteed in Singapore on behalf of the trade representation of the USSR and signed by the duly authorized persons of the said trade representation.[126] Provision is further made that in the event of dispute relating to commercial transactions concluded between Singapore physical or juridical persons and USSR organizations and in the absence of any clause in the agreement relating to arbitration, the Singapore courts shall have jurisdiction if the commercial transaction has been concluded in Singapore, and the USSR courts shall have jurisdiction if the commercial transaction has been concluded in the

126. USSR, supra note 124, Art.15.

USSR. The above does not preclude the contracting parties to any commercial transaction from providing that the courts of any other country shall adjudicate in the event of dispute.[127]

The trade agreements with the USSR, Bulgaria, Poland, Hungary, Rumania and North Korea were followed by understandings in respect of the volume of trade to be encouraged either way between the contracting states and in the co-operation of the establishment of industrial projects and enterprises in Singapore. It is the general arrangement that parts of the proceeds from the sales of goods from the aforesaid countries to Singapore are to be utilized for the counter-import of Singapore goods into the aforesaid countries. The understanding with the USSR is that trade either way within the first year of the understanding shall be up to the value of US$5 million. Fifty per cent of the proceeds resulting from the import into Singapore of USSR goods are to be used for counter-import into the USSR of goods manufactured, assembled, substantially altered or originating in Singapore. Within any one year of the understanding up to one-third of the aforesaid fifty per cent may be utilized for the repairing, bunkering and provisioning of USSR vessels in Singapore.[128]

In the understanding with Bulgaria, Bulgaria agreed to make all efforts to purchase Singapore manufactured goods up to the amount of US$1 million within the first year of the trade agreement. If the import of goods of Bulgarian origin into Singapore for the first year is between US$2 million and US$3 million, then the Bulgarian

127. USSR, _supra_ note 124, Art.19.
128. USSR, Protocol, Singapore Treaty Series T 2 of 1968.

purchase of Singapore manufactured goods will be up to the value of US$1.5 million, and if the import of Bulgarian goods exceeds the amount of US$3 million, fifty per cent of such excess is to be utilized for the purchase of Singapore goods into Bulgaria.[129]

Poland and Rumania respectively agreed that the volume of trade with Singapore either way should be up to the value of US$2 million and that seventy-five per cent of the proceeds of the sales to Singapore of Polish and Rumanian goods respectively are to be used for the counter-import of Singapore goods into Poland and Rumania.[130]

The understanding with Hungary is that the volume of trade should reach the sum of £700,000 sterling by the end of the first year of the trade agreement and that three-fourths of the proceeds of sales by Hungary to Singapore is to be used for the counter-import of Singapore manufactured goods into Hungary.[131]

The arrangement with North Korea is that North Korea will utilize all the proceeds resulting from the sale of North Korean goods to Singapore for the counter-import of Singapore goods as soon as possible within each calendar year.[132]

The understandings in respect of the volume of trade and the purchase of goods of one contracting state from the other contracting

129. Exchange of Letters between Bulgaria and Singapore, May 5, 1966.
130. Exchange of Letters between Singapore and Poland, June 7, 1966; Exchange of Letters between Rumania and Singapore, January 31, 1967.
131. Exchange of Letters between Hungary and Singapore, March 1, 1967.
132. Exchange of Letters between Singapore and North Korea, May 13, 1967.

state are subject to subsequent agreement between contracting parties to the commercial transactions on terms such as the price and the quality of the goods.

Further understandings are reached with Bulgaria, Hungary and Rumania for the establishment of industrial projects and enterprises in Singapore on production-sharing terms, joint ventures and on other terms to be agreed upon between the participating parties to the project. For this purpose the competent organizations and enterprises in the aforesaid countries are prepared to provide the Singapore firms with the necessary technical assistance by carrying out designing and research work, supplying complete machinery and other equipment, assisting in the training of Singapore personnel and providing all the required up-to-date technology and other services. Repayment in respect of the establishment of such a venture may be in the form of the products of the enterprise or other Singapore goods or other terms to be agreed upon between the contracting states to the project.[133]

The trade agreements and understandings contain only skeletal provisions for regulating commercial transactions between the contracting parties. Specific terms of the commercial transactions and the actual volume of trade are dependent on the subsequent contracts to be entered into between the physical and juridical persons

133. Exchange of Letters between Singapore and Bulgaria, May 5, 1966; Exchange of Letters between Hungary and Singapore, March 1, 1967; and Exchange of Letters between Rumania and Singapore, January 31, 1967.

and organizations of the contracting states. Therefore unless the trade agreements and understandings are followed by the conclusion of such contracts, they are mere expressions of good intention and the other contracting states cannot be considered automatically available markets for Singapore manufactured goods.

As part of its efforts to promote Singapore goods effectively, the Singapore government was also responsible for the incorporation of Intraco Private Limited, an international trading company for the purposes of promoting Singapore goods and to assist local enterprises by way of importing the required raw materials in bulk and the exporting of their manufactured goods.[134]

The Singapore government has therefore attempted to ensure that besides the investment incentives granted by way of tax reliefs under the Act, the related services such as consultation, banking and financing services as well as import and export services and the availability of markets are not lacking so as to discourage foreign investors from investing in Singapore.

SINGAPORE GOVERNMENT'S POLICY

There is no statutory legislation in Singapore providing for

134. Intraco Private Limited was incorporated on November 5, 1968. Thirty per cent of the shares in Intraco Private Limited are held by the Singapore government - Letter from Intraco Private Limited to Mah, December 15, 1970.
According to a report in the Far Eastern Economic Review, Yearbook 1970, p.259, the Singapore government intends to channel all trade with the Communist bloc countries through Intraco Private Limited.

the protection of the foreign investor against non-commercial risks including expropriation. In a developing country such as Singapore, the government is forced to play a pervasive role in the planning of its economy and industrialization programme and is directly involved in participating to a marked degree in certain commercial and industrial projects and undertakings especially those related to public utilities and industries of strategic importance such as mint and ammunition production. The Singapore government through the EDB controls the types of industry which should be encouraged to be established in Singapore and the sites of such industries. The Singapore government is also indirectly involved in industrial financing and international trading through the DBS and Intraco Private Limited. The role of the Singapore government in the industrialization programme of Singapore would understandably give rise to apprehension and fear that the degree of governmental interference in the field of business would be more pronounced. However, in view of the efforts and actions of the Singapore government to attract foreign capital, it is not surprising that the declared policy of the Singapore government is that it has no intention to nationalize and run industrial enterprises except those for public utilities and industries of strategic importance such as mint and ammunition production.[135] It is also the declared intention of the Singapore government to ultimately relinquish its equity participation in the industries to the public as soon as such industries are established

135. Letter from EDB to Mah, September 15, 1970.

on a firm footing so that such funds invested are made available to finance new industrial projects.[136] The question whether an industry is on a firm footing is, however, subjective and is therefore entirely dependent on the Singapore government's interpretation and policy.

SCREENING OF FOREIGN INVESTMENT

The policy of the Singapore government is that any amount of foreign capital may be brought into Singapore but the subsequent use of such foreign capital can be made only with the approval of the exchange control authorities. The choice of investment by the foreign investor is therefore indirectly controlled by the exchange control authorities and influenced by the industrialization programme of the Singapore government. Although it is also the declared policy of the Singapore government that approval will be readily granted for the use of such funds, it is reasonable to presume that the ready approval refers to funds intended to be invested in industries or projects which meet with the approval of the Singapore government and which contribute significantly to the industrialization programme and economy of Singapore.

The requirement of approval in the use of the foreign capital brought into Singapore is a necessary and indispensable condition for the operation of its national economic planning in the industrialization programme. There are, however, other reasons based on economic policy which are generally advanced for the control of

136. *Supra* note 135.

foreign investment. The most important and widely found reason is the concern over the capital importing country's balance of payments. Governments of capital importing countries are concerned to ensure that the foreign capital imported will not ultimately have an adverse effect on the countries' balance of payments. There is, therefore a tendency to favour the establishment of enterprises contributing to an expansion of exports. It is in fact the policy of the Singapore government to concentrate on the establishment of enterprises which will produce goods for export. Another reason for controlling the types of enterprises in which foreign capital may be invested in is to avoid excessive concentration of foreign investment in a few fields. The desirability of controlling foreign investments cannot be evaluated in the abstract as it is dependent on the conditions of each capital importing country and its national policy.[137]

Although such control has been said to be a deterrent to foreign investment and its removal had been advocated as a pre-condition to the greater inflow of foreign investment into a capital importing country, the extent to which such control affects the volume of foreign capital into the capital importing country is doubtful.[138] Control of the types of industries in which foreign capital may invest in assures the foreign investor that he is in accord with the capital importing country's public policy requirements and may possibly

137. See Fatouros, Obstacles to Private Foreign Investment in Underdeveloped Countries, (1961) 2 Current Law and Social Problems 194, 211.
138. Brandon, Legal Deterrents and Incentives to Private Foreign Investments, <u>supra</u> note 116, p.51; Fatouros, <u>supra</u> note 137, p.212.

qualify such investments for privileges. In Singapore, approval of the project to be invested in ensures that there is a need for such an industry according to the survey and research carried out by the EDB. In other words the chances of the approved industry's success has been evaluated and its potential assessed. The foreign investor in such a case is in fact benefitting from the governmental control. In addition, the approved industry in which the foreign investor is encouraged to invest in may also most likely qualify for tax privileges provided for under the investment incentive laws of Singapore.

The right of the state to determine the types of industry which should be allowed to be established within its jurisdiction is a recognized right which cannot be contested in international law as it relates to its domestic affairs.[139] Furthermore, the foreign capital is not committed in any way before its admission into the country. It is reasonable practice for the foreign investor to verify with the relevant authorities whether his proposed project is acceptable before bringing in the foreign capital into a country such as Singapore where there is a national industrialization programme and where the approval of the exchange control authorities is required before such foreign capital can be utilized.

139. Screening may be considered as coming under the general rule allowing states to impose any restrictions they see fit on the entry and residence of aliens, Hyde, International Law (revised edition Boston 1945), Vol.I, p.216.

RESTRICTIONS ON THE ENTRY OF FOREIGN CAPITAL

The practice of screening is closely related to the imposition of restrictions on the entry of foreign capital either into certain specified fields of the economy or into the country as a whole. The restrictions may be by legislation or may result indirectly from the policies of the government of the capital importing country and usually do not aim at the total exclusion of foreign investors but the increased participation of local capital finance in foreign-financed enterprises. Such participation is useful to the capital importing country as it facilitates the full integration of the foreign-owned enterprise into the local economy and promotes more effectively the transmission of technical and managerial skill and know-how.[140]

A state is entitled to regulate and impose restrictions on the entry of foreign capital in respect of any participation in its economy and it is not unlawful for it to require that no foreign-owned enterprise operates in certain industries or that certain industries are open to its nationals only. It may also require that ita national own part of any foreign-owned enterprise.

In Singapore, industries relating to public utilities, mint, and ammunition production are state-owned for security reasons. In other industries there are no restrictions on participation by

140. See League of Nations, Special Joint Committee on Private Foreign Investment, "Conditions of Private Foreign Investment" (1946), p.14; U.N.Doc.A/AC/ 97/5/Rev.1, December 27, pp.76-95: a thorough survey of measures requiring or encouraging such participation.

foreign investors. However, regulations relating to companies and the conditions under which some tax reliefs are granted under the investment incentive laws of Singapore indirectly require local participation to some extent in foreign-owned enterprises. The legislation governing companies requires a company to have at least a director and a secretary who are ordinarily resident in Singapore.[141] There is no specific legislation requiring local participation in foreign-owned enterprises or restrictions on their right to hold property.[142] But pioneer and expanding enterprises which wish to qualify for further tax reliefs under the Act are required inter alia to have more than fifty per cent of their paid-up capital to be held by persons permanently resident in Singapore as one of the pre-requisites.[143]

The right and extent of the foreign investor to participate in business in Singapore, though not restricted by legislation, may be curtailed to some extent by governmental policies which influence the decision of the exchange control authorities whether to permit foreign capital brought into Singapore to be used as the foreign investor deems fit or to approve the use of such foreign capital only in projects in accord with the national planning of the economy of Singapore. Invariably the national planning of the economy influence the type of investment which would meet with the approval of the exchange control authorities.

141. The Companies Act, No.42 of 1967, ss.122 and 139.
142. The Companies Act, supra note 141, s.331. See Fatouros, supra note 137 for examples of the types and extent of restrictions placed by some developing countries.
143. The Act, supra note 15, ss.10(2)(b) and 23(2)(b).

EMPLOYMENT OF ALIENS

The lack of the necessary skill labour is often referred to as one of the deterrents to the inflow of foreign capital into the capital importing country. This is often further aggravated by legislation restricting the employment of foreign labour.[144] In Singapore there is no legislation against the employment of foreign labour but before an alien can take up employment, application must be made for a residence and work permit. It is therefore the relevant authorities responsible for the issue of the work and residence permits who determine the employment of aliens notwithstanding that there is no legislation restricting the same. The actions and policies pursued by such authorities are factors which determine whether foreign investors are going to face difficulty in employing technical and managerial skills and know-how in the absence of the local equivalent. Unless the actions of the relevant authorities are sufficiently elastic to admit foreign labour whenever the employment of foreign personnel is essential for the efficient operation of the enterprise, the lack of the required skill labour will be an obstruction to foreign investment.

The problem of the employment of foreign labour is also related to foreign exchange restrictions. Restriotions on the remittance of their salary to their home country will dissuade aliens from being willing to work in Singapore. Although the Singapore government's

144. For examples of countries which have statutory legislations restricting foreign labour see Fatouros, supra note 137, p.221.

policy is to allow such remittance of the earnings, permission must still be obtained by way of application before such remittance can be made.

The absence of legislation on the restriction of employment of foreign labour does not mean that Singapore has an added advantage over other countries which have such legislations as much depends on the actions of the relevant authorities who indirectly determine the admission of foreign labour through control over the issue of work and resident permits.

FOREIGN EXCHANGE

Foreign exchange control is important to a country for ensuring that its balance of payments, that is, the outgoing payments by the country does not exceed its receipts of internationally accepted medium to such an extent so as to create a crisis in its balance of payments and to require the traditional remedy of devaluation in order to correct the situation. In virtually every country there is a psychological barrier to devaluation which is often interpreted as a sign of failure on the part of the government. Devaluation is also a factor feared by the foreign investor.

The general principle applicable in international law is that a state has exclusive competence to regulate monetary matters within its jurisdiction. Consequently the imposition of exchange control restrictions is in no way unlawful in international law.[145] However,

145. Hyde, supra note 139, pp.690-692; Mann, The Legal Aspect of Money, (2nd. ed. London 1953), pp.419-423.

the existence or possibility of future imposition of exchange control restrictions constitute a major obstacle to foreign investment. Even with the policy of the Singapore government that exchange control authorities will give their approval readily, the matter is still subject to administrative discretion and foreign investors are required to submit to various formalities in order to obtain the requisite approval whenever they desire to transfer their capital or earnings outside Singapore.

In Singapore, the Exchange Control Ordinance[146] (hereinafter referred to as "the Ordinance") regulates the flow of currencies into and out of Singapore. The Ordinance makes a distinction between countries which are listed in the First Schedule of the Ordinance and referred to as the Scheduled Territories and countries outside the Scheduled Territories.[147] There are no exchange control restrictions on capital transfers, remittance of profits and reparation of capital to and from Singapore and the Scheduled Territories.

146. M. No.57 of 1953 (Reprint: February 9, 1966) as amended.
147. Ibid., s.2. The countries listed in the First Schedule are the Commonwealth of Australia, Barbados, Botswana, Ceylon, the Republic of Cyprus, Gambia, Ghana, Guyana, Iceland, India including Sikkim, the Republic of Ireland, Jamaica, the Hashemite Kingdom of Jordan, Kenya, the State of Kuwait, Lesotho, the United Kingdom of Libya, Malawi, Malaysia, Malta, Mauritius, New Zealand, Nigeria, Pakistan, Sierra Leone, the Republic of Singapore, the Republic of Africa and the Territory of South Africa, the People's Republic of South Yemen, the United Republic of Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the Channel Island and the Isle of Man, Western Samoa, Zambia, any part of the Commonwealth not mentioned except Canada and Southern Rhodesia, any Protectorate, protected state or trust territory within the meaning of the British Nationality Acts, 1948 and 1958; and Swaziland.

The foreign investors resident in the Scheduled Territories are therefore not affected by the exchange controls in Singapore. The list of the Scheduled Territories is, however, subject to change by the executive and the Controller of Foreign Exchange may therefore at any time by order amend the list of the countries comprising the Scheduled Territories by adding to or excluding the countries listed therein or otherwise.[148]

The provisions of the Ordinance are applicable to all other countries except the Scheduled Territories. Payments to and from such other countries and Singapore can be made only with the approval of the exchange control authorities. In accordance with the Singapore government's policy to encourage the flow of foreign capital into Singapore, residents outside the Scheduled Territories are permitted to bring in any amount of capital but the subsequent utilization of the same must be made only with the prior approval of the exchange control authorities. In Singapore any shares, stock, bonds, notes other than promissory notes, debentures, debenture stock, units under a unit trust scheme and shares in an oil royalty can only be held by residents outside the Scheduled Territories with the approval of the exchange control authorities.[149] It follows that any shares in a pioneer enterprise, an expanding enterprise or an export enterprise can only be held by residents outside the Scheduled Territories with the approval of the exchange control

148. The Ordinance, supra note 146, ss.8-10.
149. The Ordinance, supra note 146, s.2 definition of "securities"; Part IV - Securities.

authorities who are therefore indirectly controlling the use of foreign capital and the types of investment available to the foreign investor.

Approval of the exchange control authorities is also required in respect of any shares to be paid out in lieu of any approved royalties, fees or contributions under the Act to be held by residents outside the Scheduled Territories. All dealings in such approved investment can only be made with the prior approval of the exchange control authorities. The approval of the exchange control authorities must again be obtained prior to any payments made to residents outside the Scheduled Territories in respect of any approved investment whether in the form of profits, dividends or remittance of capital.

The present policy of the Singapore government is that approval will be readily granted to all foreign capital brought into Singapore to be used especially for investment in projects conforming to its industrialization programme. Assurance has also been given for the remittance of profits arising from such investment or reparation of such foreign capital invested to the foreign investor's home country even if such foreign investor is resident outside the Scheduled Territories. The fact however remains that the foreign investor resident outside the Scheduled Territories must still apply for the approval of the exchange control authorities before he is able to remit his earnings and capital abroad. Further, the assurances are merely policy statements and are subject to change at the whim

and fancy of the government.

EXPROPRIATION

There is no legislation providing for the protection of the foreign investor against expropriation or against any other non-commercial risks. However, in view of the Singapore government's policy to attract foreign capital it is not surprising that the Singapore government has no intention to nationalize and run industrial enterprises except those relating to public utilities and industries of strategic importance such as mint and ammunition production.[150] These assurances are only policy statements and are motivated by necessary economic expediency and public interest to attract foreign capital into Singapore's industrialization programme which is regarded to be of vital importance to its economy. Such assurances based on economic exigencies are highly susceptible to change according to the needs and necessities of the country whether by the present government or by its successor government. This in itself is therefore not effective in allaying the fears of the foreign investor of the possibility of a subsequent change of governmental policy especially when the industrialization programme reaches its ultimate goal and the urgent and necessary need for foreign capital to be injected into the country's economy is no longer a primary necessity and can therefore be dispensed with.

150. Letter from the EDB to Mah, September 15, 1970.

SUMMARY

The assurances of the Singapore government against non-commercial risks though contained only in policy statements may still be of considerable effect especially when supported by governmental efforts in providing a conducive climate through tax concessions contained in statutory legislations, effective planning, the provision for adequate basic facilities and other related services required in the field of industrialization.

The absence of such assurances in the form of statutory legislations is of no serious disadvantage. Guaranty against non-commercial risks, even if contained in the form of statutory legislation for a specified period of time is still in the nature of a unilateral act by the capital importing country and is subject to change and amendment by the existing government or its successor government as in the case of assurances in the form of policy statements. Further, the value of the statutory form of guaranty depends on its enforceability and in the interpretation given to such guaranty by the domestic court.

The value of assurances, whether made only in the form of policy statements or in the form of statutory legislation ultimately depend less on their legal form and substance but in the confidence invoked by the long-range attitude of the government of the capital importing country and of its executive and judicial services.

CHAPTER V

PROTECTION OF FOREIGN INVESTMENT

Most foreign capital importing countries have attempted to overcome the obstacle to the inflow of foreign investment by assurances of security and protection to the foreign investor by way of legislations and or policy statements.[151] Some capital importing country accord protection to the foreign investor by way of bilateral treaties made with the foreign investor's country. In the case of Singapore the assurances of security to the foreign investor are contained primarily in policy statements and to a restricted extent in bilateral treaties entered into with other countries in relation to the imposition and avoidance of double taxation concerning the national of such other countries.[152] The investment guaranty agreement with the United Kingdom is the first and only guaranty of its kind given by Singapore to foreign investors.[153] The bilateral agreement made with the United States is not a guaranty or protection to investors from the United States by the Singapore government but enables the benefit of the United States unilateral investment guaranty programme to be available to its nationals in respect of their investments in Singapore.[154]

151. See U.N.Doc. No.E/3325, Annex I (1960), Selected list of laws and official texts concerning Foreign Investment in Under-Developed Countries. The laws and texts contain legislative and executive prohibitions against appropriation of foreign-owned assets.
152. See above Chapters II and III.
153. See within pp.110-111.
154. See within pp.107-110.

To the foreign investor the assurances whether contained in legislations or merely in policy statements and even in treaties may not be sufficient inducement to invest outside his home country as he may still regard them as inadequate protection. However in earnest and in good faith the assurances may be given, the policy statements and domestic legislations can be changed at will by the local government of the country concerned. The effect of such change may be retroactive especially if the capital importing country is of the opinion that the stakes are sufficiently high to warrant the change of policy. For the same reasons treaties have been known to be breached even though the delinquent state is aware that it is liable for its tortious act under international law. The risk must further be assessed in the dual light of not only of what an existing government might do but what an altogether successor government might also do.

The risk of governmental interference is always present notwithstanding assurances by the capital importing country whether such assurances are laid down in legislations or in policy statements or in bilateral agreements. In the light of the ever present possibility of governmental interference which may result in loss to the foreign investor, the foreign investor is therefore concerned with the remedies available to him in the event of injury suffered by him as a result of the tortious act of the country of his investment. The availability of effective remedies is therefore an influencing factor in foreign investment.

Traditionally, the ordinary means by which the foreign investor with a complaint against a delinquent state and without local recourse has is the diplomatic activity of his own government. More recently states with a substantial capital exporting activity have negotiated for provisions in bilateral treaties for the protection of their nationals investing in a given country and have also initiated unilateral investment insurance programmes to insure their nationals investing abroad in certain given countries against specified non-commercial risks.[155]

DIPLOMATIC INTERVENTION

It is well established that a state has the right to intervene diplomatically on behalf of its national claiming injury by a foreign state.[156] Such intervention may be described as the use of diplomatic good offices or a formal protest.[157] Where the injured foreign investor's state is able to threaten the use of economic or military sanctions, the effect of such diplomatic intervention usually have the desired results.[158] However, in present day circumstances where the ultimate use of force is frowned upon and no longer available, it is questionable whether diplomatic intervention is

155. Fatouros, Government Guarantees to Foreign Investors, (1962), 101-120; Fatouros, The Quest for Legal Security of Foreign Investments - Latest Developments, (1963) 17 Rutgers Law Review 257, 259-261.
156. Wetter, Diplomatic Assistance to Private Investment, (1962) 29 University of Chicago Law Review 275, 297-298.
157. Wetter, *supra* note 156, pp.303-310.
158. Wetter, *supra* note 156, pp.294.

likely to be effective as a means of protection to the foreign investor.[159]

The foreign investor, further, can avail himself of the protection of diplomatic intervention only if his government is willing, at its absolute discretion, to take up his claim and such diplomatic intervention is effective if the foreign investor's government is influential enough in international affairs to have its wishes observed. Diplomatic intervention with threats, expressed or implied, is no longer freely available and political considerations often outweigh the foreign investor's interest resulting in a state being unwilling to take up its national's claim.

INTERNATIONAL JUDICIAL REMEDIES

Where the foreign investor's government decides to take up its national's claim, the matter is handled at its absolute discretion and may be settled in any manner it deems fit without consultation or reference to its national. The dispute may be settled by way of conciliation by a neutral person or organization. Conciliation is most useful where the dispute is of a technical nature and has no political or social consequences of any significance but the finding on the matter is of no binding effect.

159. United Nations Charter, Art.2 para.4 whereby the United Nations subject its member states to the folowing condition:-

> "That all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ..."

Whether the above has been strictly observed is questionable in the light of for example the armed conflict in Vietnam, and between the Arab states and Israel.

Arbitration is another means by which the dispute may be resolved. The disputing states must, however, agree to its jurisdiction and the terms of reference of the tribunal. There is always the likelihood that the delinquent state will not be prepared to consent to submit the whole matter for arbitration except for certain issues. The delinquent state may for example agree to submit for determination the issue of the legality of the act of nationalization but not the issue of compensation.

The dispute may be brought before the International Court of Justice provided it has jurisdiction over both the disputing states. The jurisdiction of the International Court of Justice is not compulsory and is dependent on a state consenting to submit to its jurisdiction. Once the matter is brought before the International Court of Justice, the foreign investor's state has the absolute discretion to handle the matter as it deems fit including the possibility of compromising the claim on whatever terms it considers as satisfactory without consulting its national.[160]

Any award made by the International Court of Justice in respect of the claim is also to be handled at the discretion of the foreign investor's state and does not automatically devolve in favour of the foreign investor. The foreign investor's state may therefore choose not to enforce the award without reference to its national.

Recourse to the present international tribunals is at present not a satisfactory means of protecting the rights of the foreign

160. Kossler, Government Espousal of Private Claims before International Tribunals, (1946) 13 University of Chicago Law Review 180, 182-183.

investor as he is dependent on his state being willing to pursue the matter since only states can be heard before such international tribunals.[161] The foreign investor also does not necessarily stand to gain even if his claim is successfully brought by his state before the international tribunal.

Proposals have been made to reconstruct the International Court of Justice so that it will be better able to provide the protection required by the foreign investor.[162] The proposal envisaged the individual being allowed to sue before the International Court of Justice by either amending its Statute or member states legislating laws authorising their nationals to sue as their agents thus avoiding the necessity of amending the Statute of the International Court of Justice.[163] However, the individual suing as agent of his state is of limited benefit as the state still retains all the powers of compromise and settlement as the individual as agent is vindicating the right and interest of his principal. The state as such principal can therefore make any compromise or settlement without its agent's consent.[164]

Another suggestion is the establishment of regional courts subsidiary to the International Court of Justice.[165] Under such a proposed system individuals and private organizations will be allowed

161. Statute of the International Court of Justice, Art.34 para.1.
162. Cummins, Protection of Foreign Investments: A Role for the International Court of Justice?, (1963) 38 New York University Law Review 918, 937-945.
163. Cummins, _supra_ note 162, pp.939.
164. _Ibid_.
165. Cummins, _supra_ note 162, pp.939-941.

not only to appear in the regional courts but also to appeal to the International Court of Justice. Such a system call for extensive change to be made to the basic nature of the International Court of Justice from a court of first instance to a court of appeal requiring therefore comprehensive revision of the Statute of the International Court of Justice and the division of participating states into appropriate regions. The process of creating such a system would necessarily be long and complicated since there must be agreement among all the participating states to the proposed changes to the Statute of the International Court of Justice.

A further suggestion to modify the International Court of Justice to implement the regional court system without the major changes required is for the International Court of Justice to use its inherent authority to create tribunals or panels of judges for the specific purpose of adjudicating in problems relating to foreign investments and to amend the Statute of the International Court of Justice to enable individuals as well as private organizations to sue states before such tribunals or panels of judges.[166]

The granting to individuals and private organizations standing before an international tribunal can be by way of treaty agreement between states or by amending the Statute of the International Court of Justice. It is necessary to grant individuals and private organizations standing in international tribunals if they are to have adequate remedies in matters relating to foreign investments. The

166. Cummins, <u>supra</u> note 162, pp.941-943.

granting of such a standing eliminates the necessity of the individual and the private organization from having to secure the support of his or its state in order to bring the dispute before the international tribunal and it also eliminates the state's problem of having to decide whether to proceed with its national's claim to the possible detriment of its relations with the delinquent state

The suggested re-organization of the International Court of Justice and the granting to individuals and private organizations the right of access to the international tribunals are of limited benefit unless the international tribunals are also given the right of compulsory jurisdiction over all the participating states. The present requirement that states must consent to submit to the jurisdiction of the international tribunal before the dispute can be brought before such international tribunal had oftentime been a major obstruction to the effectiveness of the international tribunal as a dispute solving forum.

Access to the international tribunals is also of limited benefit and effect as a means of remedy unless any award made by the international tribunals can be effectively enforced.[167] The devices

167. Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. Rep.4, the first case adjudged by the International Court of Justice where the award could not be enforced despite extensive efforts. Except for that case, all decisions of the International Court of Justice had been clear of any refusal to comply. The number of decisions rendered, however, had been quite small and it is therefore difficult to form any final conclusion on the good record. See Schacter, The Enforcement of International Judicial and Arbitral Decisions, (1960) 54 American Journal of International Law 1, 8-12.

presently used to encourage compliance with the award of the international tribunal are the usual diplomatic measures in the form of protests, good offices, negotiation, conciliation and even severence of diplomatic relations or economic warfare.[168] Recently some states have used the method of freezing and taking the assets of the judgement debtor state which can be located within their jurisdiction.[169] Such methods to induce compliance with the award of the international tribunal apparently are not violation of international law.[170]

In the case of foreign investment, the most apparent effective method to induce compliance with any award made by the international tribunal is to bring the failure to comply with such award to international attention so that the judgement debtor state's credit or investment rating will be adversely affected. The possibility of a significant reduction in the inflow of foreign investment, especially when it is needed, may prompt a state to comply with the award of the international tribunal.

BILATERAL TREATIES

Some capital exporting countries have resorted to bilateral treaties to secure protection for their nationals investing abroad

168. Schacter, supra note 167, p.5.
169. Schacter, supra note 167, pp.8-10.
170. Schacter, supra note 167, pp.7 and 8.

in specific countries.[171] The extent of the protection accorded by the bilateral treaty depends on the provisions therein and the interests of the capital exporting country and the capital importing country. The bilateral treaties entered into by the United States, for example, generally provide _inter alia_ for entry, movement and residence of individuals, liberty of communication, protection of acquired property, standing in courts, right to establish and operate businesses, formation and management of corporations, acquisition and tenure of property, tax treatment, administration and exchange controls, rules on international trade and customs administration, rules governing the state in business, treatment of ships and shipping, transit of goods and persons, settlement of disputes and procedural clauses.[172]

Bilateral treaties generally provide that in the event of dispute resort should first be made through diplomatic intervention and other peaceful means such as conciliation through the good offices of third parties or international agencies to help the contracting states work out their own solution to the dispute. Failing which the dispute is to be referred to arbitration or the International

171. The three leading capital exporting countries, the United States, West Germany and Japan have resorted to bilateral treaties to secure protection for their nationals investing abroad. For a discussion of the provisions of such bilateral treaties see Fatouros, Government Guarantees to Foreign Investors, (1962), 92-101, 167-171, 184, 185, 222-226; Fatouros, Quest for Legal Securities of Foreign Investments - Latest Developments, (1963) 17 Rutgers Law Review 257, 258-275.
172. For a synoptical outline see Walker, Modern Treaties of Friendship, Commerce and Navigation, (1958) 42 Minnesota Law Review 805, 808.

Court of Justice for a binding decision.[173]

Bilateral treaties, though containing provisions governing the circumstances and treatment to be accorded to the foreign investor cannot, however, be exhaustive because of the difference in interests of the capital exporting country and the capital importing country. Even if the bilateral treaty contain exhaustive provisions there is no guaranty that the capital importing country will be always in compliance with such provisions as states have been known to breach treaty provisions notwithstanding that they would be liable under international law for their tortious act.[174] Furthermore, sanctions against the delinquent state are not generally provided for in the bilateral treaty. There is therefore no effective measure to prevent the breach of the provisions of such bilateral treaty except for the fact that the continuing need of foreign capital by the capital importing country and the possibility of concerted action on the part of capital exporting countries to cut off or effectively reduce the inflow of foreign capital into such capital importing country may dissuade the capital importing country from committing a breach of the provisions of the bilateral treaty.

173. The Protection of Private Property Invested Abroad, a report by the Committee on International Trade and Investment Section of International and Comparative Law, American Bar Association, January, 1963, pp.39-56.
174. See for example Case Concerning Certain German Interests in Polish Upper Silesia (The Merits) Judgement No.7 of May 25, 1926, P.C.I.J. Public Series A, No.1; Case Concerning the Factory at Chorzow (Claim for Indemnity) (Merits), Judgement No.13 of September 13, 1928, P.C.I.J. Public Series A, No.17.

Any claim by an individual for injury suffered as a result of the breach of the provisions of the bilateral treaty can only be made through the individual's state as the bilateral treaty is an agreement between states. The scope and degree of protection accorded by the bilateral treaty to the foreign investor is therefore dependent on the extent to which his state elects to espouse his claim diplomatically or legally in the light of political considerations. The foreign investor's right to protection in spite of the provisions of the bilateral treaty is therefore still subjected to a certain extent of uncertainty and he is in fact not accorded any more effective protection than that under diplomatic intervention in the absence of any bilateral treaty.

To date the only agreements between Singapore and other countries relating to the protection of foreign investments are the bilateral agreement with the United States and the recently concluded investment guaranty agreement with the United Kingdom.[175]

The bilateral agreement with the United States enables the United States national to qualify for a guaranty against non-commercial risks from his government in respect of certain investments undertaken by him in Singapore provided such investment has been duly approved by the Singapore government. The guaranty is issued

175. Exchange of Notes Constituting an Agreement between the USA and Singapore relating to Investment Guaranties, (1966) 580 U.N.T.S. 221.

Investment guaranty agreement concluded between Singapore and the United Kingdom on February 16, 1971, reported in the International Finance News Survey, Vol.XXIII No.10, March 17, 1971.

by the United States government in accordance with its investment guaranty programme which insures investments by its nationals abroad against specified non-commercial risks provided there is a supporting bilateral agreement between the capital importing country and the United States.[176] Without the presence of the bilateral agreement between Singapore and the United States, investments by United States nationals in Singapore do not qualify to be insured in accordance with the United States investment guaranty programme. The investment by the United States national must meet with the requirements of the United States guaranty programme as well as the approval of the Singapore government before the guaranty may be issued by the United States government. Thus not all investments by the United States national are eligible to be guaranteed. In the event of expropriation of the assets of the guaranteed investment by the Singapore government, the injured United States national can look to the United States for indemnity under the guaranty issued. The bilateral agreement makes it possible for the United States to extend its investment guaranty programme to cover certain specified investments by its national in Singapore and is a guaranty by the capital exporting country to its own national and not a guaranty by Singapore as the capital importing country.

The bilateral agreement provides only for the procedure to be adopted by the governments of the United States and Singapore in the

176. See Miller, Protection of the United States Investment Abroad: The Investment Guaranty Programme of the United States, (1963-1964) 32 George Washington Law Review 288

event of expropriation by the Singapore government of the assets of a guaranteed investment resulting in the United States government having to indemnify its injured national according to the guaranty issued. The Singapore government undertakes to recognize the assignment by the injured United States national to the United States government of all his rights, title and interest in the expropriated assets including all assets rendered useless as the result of the expropriation of any assets forming part of the guaranteed investment. Recognition is also given to the right of the United States government to any claims or cause of action or right of such injured United States national arising in connection with the expropriation.

Disputes arising under the bilateral agreement are to be resolved first by direct negotiation between the Singapore government and the United States government. Failing settlement by mutual agreement within a reasonable period of time, the matter is to be referred to a sole arbitrator for a final and binding decision. The sole arbitrator is to be jointly appointed by the two governments but if after three months the two governments fail to agree, either government may request the President of the International Court of Justice to appoint the sole arbitrator to resolve the dispute.

The bilateral agreement provides for the expropriation of the assets of a guaranteed investment to be settled between the two governments. The injured United States national is not affected by the decision of his government whether to pursue the matter as he is indemnified in accordance with the guaranty issued by his government in the event of expropriation of his guaranteed investment or on the

happening of any commercial risk against which his investment in Singapore is insured for.

On February 16, 1971, Singapore agreed with the United Kingdom on an investment guaranty scheme for the benefit of certain approved British investment in Singapore.[117] This is the first occasion that Singapore has given a guaranty to foreign investors. British investments approved for coverage under the investment guaranty scheme by the Singapore government are assured of protection for a period of eight years as from the date of the coverage. The protection is against expropriation and non-convertibility of the whole or any part of the profits of the protected investment into sterling for remittance to the United Kingdom.[117a] The investment guaranty scheme applies only to approved British investments made between January 18, 1971 and June 30, 1973.[117b] The Singapore government may, however, extend the investment guaranty scheme to cover British investments made after June 30, 1973.[117c]

In pursuance of the investment guaranty scheme, the Singapore government by an irrevocable trust deed is establishing a trust fund to be administered by the Crown Agents for Oversea Governments

117. Exchange of Letters between the United Kingdom and Singapore, February 16, 1971; Trust Deed made between the Government of of the Republic of Singapore and the Crown Agents for Oversea Governments and Administrations, January 18, 1971 (hereinafter referred to as "the Trust Deed").

117a. The Trust Deed, <u>supra</u> note 117, clause 14(1), The Schedule, Part II, clause (6), "Cause of Claim" covers in addition to expropriation, fiscal impositions on the property of the protected investment which are regarded to be wholly unreasonable in nature or rate.

117b. See the Application for Admission and the Trust Deed, <u>supra</u> note 117, clause 2(2)(d).

117c. The Trust Deed, <u>supra</u> note 117, clause 21(1).

and Administrations as trustees in accordance with the rules laid down in the said trust deed. For each approved British investment, the Singapore government is required to transfer to the trust fund assets in sterling equal to 105 per cent of the value of the approved investment plus two years estimated profits up to a maximum of thirty per cent of the value of the approved investment.[117d] The protected British investor is required to pay annually over the coverage period, a premium equal to one-quarter per cent of the amount guaranteed, that is, the amount paid into the trust fund by the Singapore government.[117e] In the event of any claim, the assessment of the extent of the loss is by an independent adjudicator appointed by the Crown Agents and any award made is payable out of the proceeds of the trust fund subject to a maximum of the guaranteed amount.[117f]

British investments which are not approved for coverage under the investment guaranty scheme or those made prior to January 18, 1971 are to be treated, in the event of a claim against the Singapore government, in accordance with international law and practice.

The investment guaranty scheme does not lay down the guidelines as to the types of British investment which will be approved by the Singapore government for coverage. As the matter is at the discretion of the Singapore government, only with the passing of time will it be known whether the Singapore government intends to make the investment guaranty scheme effective in practice.

117d. The Trust Deed, supra note 117, The Schedule Part I, clause (5).
117e. The Trust Deed, supra note 117, clause 5(1).
117f. The Trust Deed, supra note 117, clause 13(1).

UNILATERAL INVESTMENT GUARANTY PROGRAMME

Some capital exporting countries, notably the United States, West Germany and Japan have initiated unilateral investment guaranty programmes whereby they guarantee their nationals investing abroad against certain non-commercial risks.[178] The guaranty generally does not cover the full value of the investment and not all investments abroad qualify for guaranty.

The guaranty under the unilateral investment guaranty programme generally insures against currency inconvertibility, expropriation or confiscation and loss by reason of war.[179] The guaranty issued under West Germany's programme covers in addition loss by insurrection.[180] Japan's programme insures against loss from inconvretibility only in respect of profits and the investor is not permitted to choose the specific type of coverage but is permitted only blanket coverage.[181] The United States and West Germany allow coverage on specific non-commercial risks at the choice of the investor.

The unilateral investment guaranty programme has its limitations as not all investments abroad can qualify to be guaranteed.[182] In the

178. For a general survey of the investment guaranty programmes of the United States, West Germany and Japan, see Report of the American Bar Association, supra note 173, pp.24-38; Fatouros, Government Guarantees To Foreign Investors, (1962), 101-119; Snyder, Foreign Investment Protection: A Reasoned Approach, (1963) 61 Michigan Law Review 1087, 1092-1096.
179. Report by the American Bar Association, supra note 173, pp.25-29.
180. Snyder, supra note 178, p.478.
181. Report by the American Bar Association, supra note 173, p.33.
182. Staff Report, International Bank for Reconstruction and Development, "Multilateral Investment Insurance", March, 1962, Annex C. Findings among businessmen show that one quarter out of 54 from the United States considered that the United States investment guaranty programme effective as a stimulant to new investment in

United States and West Germany the guaranty is available in respect of investments in countries which have signed supporting bilateral treaties with the United States and West Germany respectively.[183] The supporting bilateral treaty reserves the right to the capital importing country to approve the investments before the issue of a guaranty. The United States further limits its programme to new investments which will further the economic resources and productive capacity of the under-developed countries. Japan confines the application of its programme to investments which will strngthen its balance of payments. West Germany's programme is applicable only to new investments which promote economic relations between West Germany and the under-developed countries.

Within its limitations the unilateral investment guaranty programme is of assistance to the investors as it relieves them of some risks but it cannot by itself induce an important increase in foreign investment as it is subject to the foreign policy of the particular country initiating the programme. Further as in the case of the United States and West Germany, it is dependent on the capital importing country agreeing to conclude a supporting bilateral agreement before

less developed countries but about 37% cited particular weaknesses of the programme. 88% from Japan considered the Japanese programme effective in stimualting overseas investment but about 20% described the programme as ineffective. None of the businessmen out of the 22 from West Germany characterized the West German programme as effective.

183. U.N.Doc. E/3325 (1960), pp.66-67; Report by the American Bar Association, supra note 173, pp.26-29, 34-37; Snyder, Protection of Private Foreign Investment: Examination and Appraisal, (1961) 10 International and Comparative Law Quarterly 469, 477-478.

the respective investment guaranty programmes are applicable to investments in such capital importing country. Most capital importing countries are reluctant to conclude such supporting bilateral treaty as their interests often differ from the interests of the capital exporting countries.

PROPOSED SOLUTIONS

The existing inadequate protection accorded to foreign investors have resulted in proposals for the establishment of a multilateral investment code to regulate matters between the foreign investor and the capital importing countries.[184] Such a proposed multilateral investment code is envisaged to bind both the capital importing countries and the capital exporting countries. The drafts which have been put forward generally provide for the rights of the foreign investor but are silent on the rights of the capital importing countries.[185] It is therefore not surprising that the capital importing countries are not enthusiastic over such drafts. Unless provisions are made which are acceptable to the capital importing countries, the draft multilateral investment code is meaningless. Efforts must

184. For a synopsis of the various drafts of the multilateral investment code see Snyder, supra note 183, pp.479-487; Miler, The Protection of Private Foreign Investment by Multilateral Convention, (1959) 53 American Journal of International Law 371; Fatouros, Government Guarantees to Foreign Investors, (1962), pp.69-92. Draft Convention on the Protection of Foreign Property by the Organization for Economic Co-operation and Development (OECD), (1960) 9 Journal of Public Law 116; Harvard Draft Convention on the International Responsibility of States and Aliens, (1961) 55 American Journal of International Law 548.
185. Fatouros, Government Guarantees to Foreign Investors, (1962), p.90.

therefore be made to find out the provisions which the capital importing countries require to be inserted in such multilateral investment code for their protection so that their desires may be met with as far as possible. There is inherent difficulty in drafting a multilateral investment code acceptable to both capital importing countries and capital exporting countries because of the difference in interests, economic needs, social structures and politics. Further the capital importing countries are reluctant to agree to any provision which they may deem to be restrictive of their sovereign rights over matters relating to their economy.[186]

For the purposes of resolving disputes under the multilateral investment code, a special tribunal is to be separately created.[187] States party to the multilateral investment code including their nationals are to be entitled to assert their rights before such tribunal.[188] This eliminates the necessity for the foreign investor to depend on his state's discretion whether to proceed with his claim in the light of political considerations rather than the merits of his claim. The right of the foreign investor to have direct access to the tribunal is a marked improvement in the protection and remedy available to the foreign investor as the existing International Court of Justice can adjudicate matters between states only. It is also proposed that all states party to the multilateral

186. Fatouros, Government Guarantees to Foerign Investors, (1962), 90.
187. OECD Draft Convention on the Protection of Foreign Property, <u>supra</u> note 184, Art.7.
188. <u>Ibid</u>.

investment code be subjected to the compulsory jurisdiction of the proposed tribunal.[189] This ensures that the jurisdiction of the proposed tribunal is not frustrated by the delinquent state refusing to submit to its jurisdiction. It is also suggested that an international committee be set up to decide questions concerning the adequacy, amount and form of compensation in the event of any expropriation. The law applicable will be the provisions of the multilateral investment code which are to prevail over any inconsistent national law.[190]

The proposed sanctions are publicity of the unlawful act and economic pressure. The proposed tribunal has the right to require a delinquent state to cease the unlawful act within a specified period of time. Failing compliance, the tribunal can make public announcement of the unlawful act. If this also failed to have the desired effect, the tribunal can call for economic sanctions by states party to the multilateral investment code. It is questionable whether the above suggested sanctions will have any effect especially when it has been demonstrated that economic sanctions by the international community had not been effective as a form of pressure on delinquent states.[191]

189. OECD Draft Convention on the Protection of Foreign Property, supra note 184, Art.7.
190. Miller, supra note 184, p.374.
191. For example the sanctions taken by member states of the United Nations at its call against Rhodesia and South Africa on the apartheid issue had not brought about a change in the attitude of the governments of the aforesaid countries.

The advantage of the proposed multilateral investment code is that the rights between the foreign investors and the capital importing countries are defined and under the jurisdiction of the international tribunal. The granting to the foreign investor standing before the proposed tribunal enables the foreign investor to sue the delinquent state without the necessity of being dependent on his state with the likelihood of having his claim frustrated by outweighing political considerations which influence his state not to espouse his claim.

It has been broadly agreed that the universal adoption of a multilateral investment code will be a nearly ideal solution to the problem of providing investment security to the foreign investor.[192] It is, however, doubtful whether such adoption is within practical reach in view of the divergence of interests not only between capital importing countries and capital exporting countries but also among the capital importing countries and the capital exporting countries themselves.

For the purpose of affording added protection to the foreign investor it has also been proposed that a multilateral investment insurance programme be set up with both the capital importing countries and the capital exporting countries as participating states.[193]

192. See Fatouros, Government Guarantees to Foreign Investors, (1962), pp.89-92; Fatouros, The Quest for Legal Security of Foreign Investments - Latest Development, (1963) 17 Rutgers Law Review 257, 276.

193. Staff Report, International Bank for Reconstruction and Development, _supra_ note 182. Fatouros, The Quest for Legal Security of Foreign Investments - Latest Development, _supra_ note 192, p.284; Snyder, _supra_ note 178, pp.1101-1115.

Under such a scheme the capital importing country will be required to contribute to an international fund which will be used to compensate investment losses by foreign investors due to non-commercial factors. It is hoped that the above requirement will increase the capital importing country's sense of responsibility. It is doubtful whether the capital importing country will be able to contribute a substantial amount to the fund. There is also the possibility that uncompensated expropriation will be encouraged as the loss of whatever small contribution will be more than made up by the uncompensated expropriation of a large foreign enterprise.[194] As in the case of any proposal of a multilateral nature, the difficulty of effecting the multilateral investment insurance programme is to get participating states to agree to its provisions.

SUMMARY

In the absence of statutory legislations and bilateral treaties providing for the protection against non-commercial risks, the foreign investor, in the event of loss resulting from the actions of the Singapore government, is left with recourse according to international law. Under the existing practice the foreign investor is dependent on his state to espouse his claim. The foreign investor

194. Cummins, Protection of Foreign Investments: A Role for the International Court of Justice?, (1963) 38 New York University Law Review 918, 927.

having no legal right to insist on his state espousing his claim is, in practice, virtually without recourse under international law. Even if his state proceeds with the claim, he has no control over the matter. His state has the right to conduct the claim as it deems fit.

The proposed solutions in the form of a multilateral investment code and a multilateral investment insurance programme are faced with the usual difficulty of getting the participating countries to agree on the provisions. Further the provisions in a multilateral agreement cannot conceivably cover the particular circumstances and needs of each participating state. This in itself may leave large areas open to dispute. It is therefore difficult to envisage the possibility of resolving the protection of foreign investment by a multilateral agreement.

A practical form of protection will be the bilateral treaty between the capital importing country and the capital exporting country. This enables the two contracting states to come to terms on the specific form of guaranty and the provisions thereto. At the same time the capital importing country is not obliged to grant the same terms of protection to investors from other countries but is free to negotiate depending on the circumstances and needs. It is also easier for amendments to be made to the bilateral treaty in the event of a change in the circumstances and needs of the contracting parties than a multilateral agreement. However the effect of a bilateral treaty is dependent on the contracting states observing the provisions

therein and not merely on its conclusion.

The granting to the individual and the private organization the right to appear before an international tribunal will be a positive step towards the provision of a remedy for the foreign investor. However unless the international tribunal is conferred with the right of compulsory jurisdiction over states and effective means are made available to enforce any award made by the tribunal, the right to appear and institute action will be of limited benefit.

In the light of the ineffective protection accorded to the foreign investor under the means available in international law, a country which is genuine in its efforts to attract foreign capital should be prepared to show a more positive attitude towards the protection of the foreign investor besides offering only tax inducements. Singapore, apparently is slow in according positive protection to the foreign investor besides the assurances in its policy statements. To date protection is accorded only to British investments approved for coverage under the investment guaranty scheme agreed to between Singapore and the United Kingdom. As the scheme has come into operation only on formal agreement between the two governments on February 16, 1971 it is not possible to guage whether the Singapore government will, in practice, ensure the benefits of the scheme to be easily available to British investments.

CHAPTER VI

CONCLUSION

According to a survey of British, Australian, Japanese, Taiwanese, Hong Kong and American firms operating in Singapore, the main factor which the foreign investors claimed to have attracted them to Singapore was the welcoming attitude of the Singapore government and the efficiency of the public facilities.[195] The EDB, in particular was cited to have been very helpful in many ways. Particularly important is the fact that preliminary investigations and negotiations by the foreign investor can almost be done entirely through the EDB. However, some foreign investors have complained that governmental assistance was not that readily forthcoming after the establishment of the project.[196] The ability to attract foreign investment should be equally matched with the ability to persuade the foreign investments to remain in the country for a sufficiently long period of time if the country is to derive any benefits from the foreign investments. Further any adverse publicity by foreign investors who have committed themselves to investments in Singapore is likely to adversely affect potential investors from investing in Singapore. The governmental actions in creating a conducive investment climate should therefore not be restricted to only attracting foreign investments but also to to persuade them to remain within the country.

195. Hughes and You, editors, Foreign Investment and Industrialization in Singapore, (1969), pp.71, 94, 157 and 188.
196. Hughes and You, *supra* note 195, pp.94, 157 and 158.

It is interesting to note that tax concessions are claimed by the foreign investors to be less influential than other economic and political factors in the location of industry.[197] According to the aforesaid survey, there was no instance in which tax concessions were deemed to be a decisive factor. In most cases it was claimed that they were not even taken into consideration. Nevertheless a number of the foreign enterprises reported that tax concessions had been very helpful especially in cases where profits would not have otherwise been realized during the formative period in the absence of tax concessions.

The professed indifference to tax concessions should be treated with caution. The foreign investor is a businessman and profit-making is his objective. If all things are equal he is most likely to invest in the country which offers him the possiblity of the greatest margin of profit. Whatever the extent of the tax concessions, they are admittedly helpful in the recovery of the capital costs of an investment at a much faster rate than would otherwise be possible under the tax law of the capital importing country. This will mean that profits will be realized at an earlier stage of the business enterprise. Further, the fact remains that tax concessions were recommended to under-developed and developing countries as a means of attracting foreign capital because businessmen when asked whether

197. Hughes and You, supra note 195, pp.183-187. A similar attitude was concluded from surveys carried out in Mexico, Argentina, Costa Rica, Jamaica and the United States, Lent, Tax Incentives for Investment in Developing Countries, 4 Finance and Development, 195, 201.

they wanted concessions replied in the affirmative.[198] However, tax concessions admittedly cannot induce investment in a project which according to sound business evaluation and in spite of tax concessions will not be profitable. Thus if a capital importing country restricts investment to specific types of industry which are considered not to be profitable, any tax concessions offered, however generous, will not induce the required foreign investment.

Tax concessions are designed on the assumption that short-run return expectations are of paramount importance for each individual foreign investment planned and that such expectations are formulated precisely enough to enable the foreign investor to consider the effect of tax concessions in his decision to invest. Thus the maximum period of tax holiday offered by Singapore is for the period of five years. Most large enterprises which have made substantial investments do not expect to make profits for several years. The tax holiday in such a case is of limited benefit. An investment allowance or grant based on a percentage of the capital investment may in such a case be of more benefit. The investment allowance or grant should be for credit purposes with the right to carry forward any unused amount for credit in subsequent years.

The impact of the tax concessions on the possible profits to the foreign investor is conditioned by the operation and effect of

198. Hughes and You, supra note 195, pp.187 and 188.

the tax law in his country of residence. Whatever the importance of the tax factor may be in the foreign investor's decision, the tax burden with which he is concerned with is the combined burden of the tax levied on his foreign operations by the country of his investment and the country of his residence. It is therefore in the interest of the capital importing country to enter into bilateral agreements with capital exporting countries to ensure that its unilateral tax concessions are not nullified by the tax laws of such capital exporting countries. Whether the capital importing country can obtain such a concession depends on the attitude and policy of the capital exporting countries. Thus out of the seven bilateral double taxation agreements made by Singapore, only Norway granted full tax sparing in respect of the unilateral tax concessions offered by Singapore. Another three countries, Australia, Japan and the United Kingdom granted partial tax sparing.

Many writers are concerned with the protection accorded to the foreign investor and regarded the absence or presence of such protection as an influencing factor in the foreign investor's decision process. It is questionable whether this aspect has the effect of influencing foreign investment to such an important degree. Protection whether accorded in the form of statutory legislation by the capital importing country, or merely in its policy statements, or by way of bilateral treaties is dependent on its implementation and not its form. The absence of such protection in legislation form or in bilateral treaties have not deterred foreign investment into Singapore. Although there is an existing investment guaranty scheme

for the protection of selected British investments, the effect is still to be seen. The value of protection depends less on its legal form and substance but in the confidence invoked by the actions and attitude of the government of the capital importing country.

It is difficult to determine conclusively the success or failure of any country's investment incentive programme. To compare it with the investment incentives offered by other countries is no criteria whether one investment incentive programme is more likely to succeed than the other solely on the extent of the tax concessions offered. It is not unusual for the foreign investor to choose to invest in a country where no investment incentives are offered other than those under the usual tax law of a country provided he is able to make a reasonable profit and the country is politically stable. The offer of tax concessions without a stable government is not likely to be considered attractive to foreign investors as succeeding governments are not obliged to follow the policy of the preceding government.

It is also not possible to know what the record would have been in the absence of the investment incentive programme. However, in Singapore, slightly more than half of the number of enterprises awarded pioneer enterprise certificates in each of the year from 1961 to 1966 were foreign-owned, or with foreign interests.[199]

199.

Year	Pioneer Enterprises	Foreign Interests
1961	4	2
1962	8	4
1963	101	51
1965	30	19
1966	21	14

Hughes and You, *supra* note 195, pp. 214-215.

The subsequent consolidation and amendment of the investment incentive law of Singapore in 1967 whereby enterprises are required to show a substantial minimum capital outlay before they are qualified to be considered for tax concessions indicates that in the Singapore government's opinion, it is satisfied with the amount of foreign capital coming into Singapore by that year. Prior to the amendment, the investment incentive law did not stpiulate a minimum capital outlay as a pre-requisite.[200] The consolidating act also retain the discretionary approach for determining whether an enterprise should be granted the tax concessions available. The Singapore government was therefore apparently satisfied with its investment incentive programme and could by 1967 be more stringent and discriminatory in granting tax concessions.

It can be thus concluded that the combined effect of tax concessions and the efforts of the Singapore government to create a conducive investment climate is an influencing factor in the foreign investor's decision to invest in Singapore. Singapore must however also ensure that the foreign investments should further be induced by favourable treatment to remain in Singapore for a sufficiently long period if it is to benefit from such investments.

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200. See above pp.7-8, p.13 note 28 and p.18 note 39.